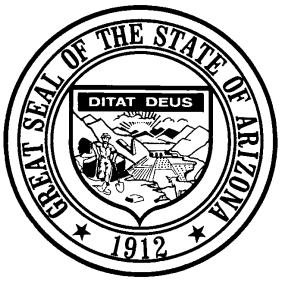
Essential Infrastructure for Information Delivery

A Study
Prepared for

Arizona Strategic Enterprise

Technology (ASET) Office



By Data Site Consortium, Inc.

November 2011 (V02H Draft)

An Arizona Roadmap for Reducing Barriers Based in Arizona Law, Policy, and Rules Hindering Establishing Public Rights-of-Way as Essential Infrastructure for Information Delivery

Arizona Strategic Enterprise Technology (ASET) Office

Essential Infrastructure for Information Delivery

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Disclaimer:

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Arizona Strategic Enterprise Technology (ASET) Office

Essential Infrastructure for Information Delivery Report

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I. Foreword by Arizona State Chief Information Officer

As is widely noted, the ubiquitous availability of Broadband has become as essential to quality of life as are the availability of other essential infrastructures of power, water, and transportation. There is no longer any doubt regarding the necessity of broadband capacity as a critical component for a region's economic well-being, job creation, and future prosperity for its citizens. Indeed, our increasing reliance on broadband communication for everything from commerce and public safety to education and healthcare, and to the efficient operation of government has marked this first decade of the 21st Century as the "Information Age."

What is our point?

Implementers of broadband infrastructure (collectively referred to as "providers") using existing poles, conduits, rights-of-way (collectively referred to as "ROW") and public rights-of-way ("PROW") could be enabled to deploy broadband services more quickly and less expensively. Quicker cheaper deployment of broadband infrastructure in rural Arizona would lead to more Arizona citizens leveraging broadband for improving their lives and the Arizona economy.

What is our environment?

Currently, local governments are focusing on ROW/PROW as enhanced sources of revenue. While providers of broadband services are characterizing local governments as barriers

to communications infrastructure deployment, the Federal Government is asking how it can quicken deployment of broadband services-and is leveraging its preemption rights for limiting local governments' control while shoring up its own inadequate initiatives/processes relative to hastening broadband deployments.

Where is Arizona State Government?

Arizona State Government, desiring economic development, may need to consider curbing delegation of its Tenth Amendment policy-making rights to Arizona cities and towns, and modifying regulations by which its agencies make ROW and PROW available. All the while, Arizona State Government is limited by federal requirement dictates that it continues obtaining the "highest and best" value for all ROW through State Trust Lands.

When we started this work, our focus was primarily at the state level. However, during the past several months the Federal Communications Commission (FCC or Commission) has aggressively asserted itself in the subject matter. The FCC's assertion has changed and appears likely to continue changing the parameters under which the states and their subdivisions must operate. Additionally some pending or suggested federal legislation could radically alter the ROW landscape. Therefore, we have adjusted our focus such that we can give proper perspective to these federal actions.

Aaron Sandeen
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II. Executive Summary

> Reliable, affordable access to high-capacity telecommunications infrastructure has become as essential as water, sewer, transportation and electricity service in creating healthy and successful communities in the 21st century. This is true for all communities, not just the urban or affluent.
>
> Arizona's own statewide economic development planning seeks to improve prosperity and the quality of life for residents in all of Arizona's communities. This requires employment opportunities, quality education, access to healthcare and effective delivery of the broad range of public services. Robust telecommunications infrastructure underpins all of them. However, such critical infrastructure has been slow in coming to many of parts of the state.
>
> Throughout the country as well as in Arizona, the private sector has invested heavily, but the industry cannot undertake an infrastructure modernization effort at the scale broadband requires by itself. Government can bridge the gap between firm industry return on investment business decisions and communities that cannot attract private investment because they are unable to demonstrate sufficient demand for a service they don't yet have.
>
> **Arizona Broadband Initiative Framework Analysis and Report** by the Center for Digital Government for the Arizona Department of Commerce, April 2007

Introduction:

This Essential Infrastructure for Information Delivery study has been performed under the auspices of the Arizona Strategic Enterprise Technology (ASET) Office (formerly GITA) under the Arizona Department of Administration (ADOA). It is funded through grants from the National Telecommunications and Information Administration (NTIA) provided through the American Recovery and Reinvestment Act of 2009 (ARRA) and the Broadband Data Improvement Act.

Herein, we identify the many Right-of-Way (ROW)[1] issues encountered by government, industry, and broadband customers, both commercial and residential and offer up insight on current trends, national policy evolution, and the State of Arizona's opportunities to undertake positive actions where appropriate and practical. The purpose of this section is to bring attention to several issues and proposed recommendations, contained within this study, that we believe are important. We first provide summaries of the problem and related initiatives. Key organizational players are presented in the following section.

> Just as wireless networks use publicly owned spectrum, wireless and wired networks rely on cables and conduits attached to public roads, bridges, poles and tunnels. Securing rights to this infrastructure is often a difficult and time-consuming process that discourages private investment. Because of permitting and zoning rules, government often has a significant role in network construction. Government also regulates how broadband providers can use existing private infrastructure like utility poles and conduits. Many state and local governments have taken steps to encourage and facilitate fiber conduit deployment as part of public works projects like road construction. Similarly, in November 2009, the Federal Communications Commission (FCC) established timelines for states and localities to process permit requests to build and locate wireless equipment on towers.
>
> While these are positive steps, more can and should be done. Federal, state and local governments should do two things to reduce the costs incurred by private industry when using public infrastructure. First, government should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way. Second, the federal government should foster further infrastructure deployment by facilitating the placement of communications infrastructure on federally managed property and enacting "dig once" legislation. These two actions can improve the business case for deploying and upgrading broadband network infrastructure and facilitate competitive entry.
>
> **U.S. National Broadband Plan, Chapter 6: Infrastructure** 2010

[1] **Types of Telecommunications Right of Way:** Various telecommunications infrastructure deployments utilize a variety of ROW in a variety of manners. Vertical ROW refers to vertical assets from which wire and fiber optics cable may be strung from place to place as commonly done on power poles or from which wireless transceivers may be affixed and operated such as light poles, power poles, monopoles, antenna towers, the sides and tops of building, etc. Horizontal or longitudinal ROW refers to longitudinal pathways along which or beneath wire and fiber optics cable may be placed, such as highways and roads, as well as utility easements, pipeline and rail corridors, canal banks, etc.

Underlying Rationale/Problem Statement:

A national premise is that broadband enabled public and private sector transactions can provide a substantial improvement in both our quality of life and economic performance. However, rural portions of America, which are unserved or underserved by broadband availability, are shut-out of these improvements. A further premise is that government policies and actions can either hinder or accelerate reducing of the proportion of Americans that lack broadband connectivity. Substantial evidence exists showing that where government has opened up its public ROW (PROW) and has lessened its restrictions on the availability of privately owned ROW, such reduction of barriers can result in rapid increases of broadband connectivity. Thus, the problem we focus to herein is the reduction of ROW and PROW barriers to further deployment of broadband connectivity.

Federal Focus and Initiatives:

The federal government has launched multiple initiatives relating to various aspects of reducing ROW and PROW barriers, opening up further deployment of broadband connectivity. We chronicle many of these federal initiatives herein, mostly led by the Federal Communications Commission (FCC) and the NTIA. In particular, these federal agencies have grappled with the portion of the broadband deployment barriers that constitutionally fall under the purview of the federal government. They are numerous, but not plenary, because several related aspects are constitutionally reserved for the states and their subdivisions. Our focus here is on the state and local initiatives, those actions that make possible deployment of new broadband infrastructure, speed its deployment, and generally reduce its costs for both providers and end-users.

State Government Perspectives and Issues:

States compete with each other as well as with other countries. Broadband connectivity is an enabler of that competition, as well as enabling educational opportunities, medical services and electronic government. As such, the State of Arizona should focus reducing barriers under its control. Those barriers related to the following:

1. Enabling deployment of additional connectivity to rural Arizona by leveraging its continuing investments in rural highways by declaring that at all times it is lawful and by directing the Director of the Arizona Department of Transportation (ADOT) to require that broadband conduit be installed as part of rural highway construction projects.
2. Taking over responsibility for administering ROW associated with utility poles, ducts, conduits, as well as related land easements for deploying fiber and towers that are currently under the jurisdiction of the FCC.
3. Establish ROW dispute-resolution processes that are binding upon local governments, state agencies, and providers.
4. Enacting legislation requiring local governments to base ROW applications on a standard format and use standard decision criteria for making decisions granting ROW.
5. Enacting legislation requiring local governments to make decisions regarding ROW applications within a fixed period of time, based on specific published parameters
6. Enacting legislation requiring local governments to limit ROW fees assessed by local governments to direct and administrative costs having a nexus with the ROW application or related zoning application

Local Community Perspectives and Issues:

Arizona communities, cities, and towns are a key determiner of whether broadband infrastructure is permitted within their respective areas, and if so, how quickly and at what cost. The Arizona communities are at the frontline of gating the delivery of broadband connectivity to Arizonians. As such, their collective decisions substantially determine the extent to which Arizona can compete domestically and internationally, as well as pacing our educational opportunities,

medical services and electronic government initiatives. Participation of our cities and towns is important. PROW and ROW barriers relating to communities can be substantially reduced by the following initiatives, if Arizona communities:

1. Recommend to the State specific ROW dispute-resolution processes that can reasonably be binding upon local governments, state agencies, and providers.
2. Recommend to the State of Arizona and the ABDC (Arizona Broadband Development Council), specific legislation that is reasonable for requiring local governments to base ROW applications on a standard format and use standard decision criteria for making decisions granting ROW.
3. Recommend to the State of Arizona and the ABDC, specific legislation that is reasonable for requiring local governments to make decisions regarding ROW applications within a fixed time period, based on specific published parameters.
4. Recommend to the State of Arizona and the ABDC, specific legislation they deem to be reasonable for local governments to limit ROW fees to direct and administrative costs having a nexus with the ROW application and related zoning application.

Broadband Provider Perspectives and Issues:

Broadband providers depend on use of ROW and leased land for deployment of their broadband infrastructure. The difficulty in permitting or leasing ROW and specific sites for infrastructure placement is often cited as one of the most significant contributors to project delays and costs, as well as the rationale for forsaking projects with insufficient ROI. Any projects crossing jurisdictions or involving State and Federal agencies and/or native tribes are well known for their uncertainty in timelines and difficulties. Broadband providers though their regional and national trade associations, as well as by their individual efforts, have worked to reduce or remove barriers, seek level playing fields, and shift the regulatory equations to allow more project certainty and manageable costs. To the extent that the State of Arizona can positively impact these concerns, we will achieve greater success in realizing increased commercial investment in broadband infrastructure.

III. Key Recommendations

A. Recommendations for State of Arizona Direct Action

Recommendation for Enacting State of Arizona Broadband Infrastructure Coordination Office

We recommend that Arizona establish a Arizona Broadband Infrastructure Coordination Office (ABICO) having as its advisory panel the Arizona Broadband Development Council. Specifically, we recommend that the Arizona Legislature pass for the Governor's signature a bill establishing the ABICO and enabling it to:

Develop and adopt funding criteria and prioritization schedules for broadband infrastructure projects with consideration for recommendations submitted by governmental and educational entities, telecommunications businesses, information services, medical services and statewide trade and business organizations.

Consider developments and best practices in other states where broadband services are being deployed for underserved areas, the broadband infrastructure in those areas and the direct and indirect costs and benefits associated with the broadband infrastructure.

Adopt specific goals for deployment of broadband services in unserved and underserved areas, including:

- the development of economically competitive access to broadband services in the public and private sectors in each unserved and underserved area.
- the availability of broadband service access throughout the underserved areas to address issues of unserved and underserved communities.
- the development and expansion of practical applications for the enhancement of economic development and other public benefits.

- the development of affinities and interconnection among governmental entities, educational institutions and private enterprise and other goals that the board considers to be in the public interest.
- develop proposals and recommendations for the establishment and enhancement of broadband services in unserved and underserved areas.

See Appendix D - Arizona Broadband Infrastructure Coordination Office Draft for sample language.

Recommendation for Enacting State of Arizona Legislation Codifying Two Highways for the Price of One in Arizona

We recommend that Arizona deploy to the fullest extent possible the concept of two highways for the price of one—because the cost of installing fiber-optic conduit along rural highways generally less than 1% of the cost of the roadway.[2] That is to say, Arizona should leverage its continuing investments in rural highways by directing Arizona Department of Transportation (ADOT) to require that broadband conduit be installed as part of rural highway construction projects. Also, the directive should define any necessary funding mechanisms for recovery of the incremental cost as well as the opportunity and processes for shared public-private use of such conduit.

Specifically, we recommend that the Arizona Legislature pass for the Governor's signature a bill enabling the ADOT Director to install broadband conduit as part of any rural highway construction or repair project:

[2] Assumes actual cost recovery. Industry average construction cost data shows that the cost of physically installing fiber-optic conduit alongside a rural highway is, on average, less than approximately 1% of the cost of constructing or resurfacing a single lane of that highway. This cost is also roughly equivalent to the cost of applying the paint stripes to the highway. There is also the opportunity that ADOT must lay fiber or conduit at cost along highways that are not currently under construction or repair at actual cost recovery using appropriate techniques including micro-trenching, provided said actual costs are paid by a community and/or a private sector entity.

(1) Having an appropriate number of broadband conduits, as determined by the Director

a. are installed along rural State highways to accommodate multiple broadband providers, with consideration given to the availability of existing conduits;

b. the size of each such conduit is consistent with industry best practices and is sufficient to accommodate potential demand, as determined by the Director;

(2) Including hand holes and manholes for fiber access and pulling with respect to each such conduit are placed at intervals consistent with industry best practices, as determined by the Director; and

(3) The Director coordinate with the Arizona Broadband Development Council (ABDC) for carrying out this section as the Director determines appropriate, including in making determinations with respect to potential long-term demand for conduit access.

For the purposes of this recommendation, the term "rural highways" means that portion of any highway in Arizona that is also outside the municipal boundary of any Arizona city having a population of 10,000 or more persons, and is funded by State and/or federal monies. See Appendix C - Arizona Broadband Conduit Deployment Act of 2012 Draft for sample language.

Recommendation for the Study and Adoption of State Preemption of Federal Pole Attachment Authority

The State of Arizona should specifically study the option of state[3] preemption of federal pole attachment authority with the objective of taking responsibility for administering ROW associated with utility poles, ducts, conduits, as well as related land easements for deploying fiber and towers, which are currently under the jurisdiction of the FCC.

[3] Section 1.1402(g) defines the term "state" to mean any state, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof. 47 C.F.R. S:1.1402(g).

Should Arizona determine this recommendation is in its better interest, it must certify to the FCC that it will regulate rates, terms, and conditions for pole attachments, and, in so regulating, considers the interests of subscribers of cable television services and of telecommunications services, as well as the interests of the consumers of the utility services. Arizona must issue and made effective rules and regulations implementing their regulatory authority over pole attachments, including a specific methodology for such regulation and make the rules and regulations publically available in the state.

Arizona must then petition the FCC pursuant to Section 1.1414(b) of the Commission's rules on pole attachments. The Arizona certification to the FCC preempts the Commission from accepting pole attachment complaints under Subpart J of Part 1 of the Rules. The following elements are recommended for incorporation into Arizona legislation for preemption of current federal pole attachment authority:

- Burdensome regulation should be avoided.
- More than one method for dispute resolution should be made available.
- No limitations on the kinds of services that pole licensees can offer.
- Open communication among pole owners and pole users should be encouraged.
- Coordinate means for pole inventories and inspections between pole owners and users
- Adopt FCC unauthorized attachment safeguards and safety standards.
- Require pole owners notify pole users of the opportunity to appear before State governing board for conflict resolution.
- Adopt FCC pricing formulas, not establish a fixed rate for pole attachments.
- All pricing formula should be strictly cost-based and non-discriminatory.
- Pricing formula applies to all pole users, including affiliates of the pole owner.
- Analogous rates, terms and conditions should apply to conduits and rights of way.

- Timely processing of attachment applications by adhering to FCC shot clock.
- Make-ready work and non-emergency transfers completed within set period of either permit application or notification by pole owners (such as 60 days).
- Allowing over-lashing and related FCC attacher implementations.

Recommendation for establishing straight-forward PROW/ROW dispute resolution methods.

Arizona should establish ROW dispute-resolution processes that are binding upon local governments, state agencies, and providers. Arizona should link the adoption of the ROW dispute-resolution processes by local and state agencies to eligibility for state and federal grant programs.[4]

Recommendation for standardizing processes of obtaining PROW/ROW permits from state entities and local governments associated with constructing broadband infrastructure in Arizona.

Arizona should enact legislation requiring local governments to base ROW applications on a standard format and use standard decision criteria are making decisions granting ROW. The state should require all state agencies granting ROW adhere to the same process requirements imposed on local jurisdictions.[5] Arizona should link the adoption of standardized ROW processing by local and state agencies in eligibility standards for state and federal grant programs.

Recommendation for standardizing time-period for obtaining PROW/ROW permits from state entities and local governments.

[4] State and federal programs that should be linked to ROW compliance legislation include the federal Rural Utilities Service (RUS) grant and loan programs, FCC Universal Service Fund programs, ACC Universal Service Fund programs, and other funding programs that directly relate to deployment or use of broadband services or infrastructure.
[5] Similar to Section 224 shot clock constructs.

Arizona should enact legislation requiring local governments to make decisions regarding ROW applications within a fixed period, based on specific published parameters. Arizona should link the adoption of the fixed time for granting ROW requests by local and state agencies in eligibility standards for state and federal grant programs.

Recommendation for limiting ROW/PROW fees to their cost basis.

Arizona should enact legislation requiring local governments to limit ROW fees assessed by local governments to the direct and administrative costs having a nexus with the ROW application or related zoning application. The state should impose the same restriction on all state agencies granting ROW. Arizona should link the adoption of the ROW fee limitations by local and state agencies to eligibility standards for state and federal grant programs.

B. Recommendations for Federal Monitoring, Influencing, and Aligning

Arizona Monitoring, Influencing and Aligning Federal Broadband Legislation, Rules and Regulations.

The federal government has determined that legislating in the area of telecommunications generally and broadband specifically, federal legislation is preemptive of state and local efforts. Further, because such federal legislation and related rules and regulations have significant impact on Arizona, it is recommended that the State of Arizona establish systematic monitoring of all related federal legislation, rules and regulations.

Additionally, once the systemic monitoring is in place, we recommend that Arizona go about the processes of influencing and aligning with the federal legislation. Such additional effort might include forming a consortia with other western states for purposes of influencing the U.S. Administration and Congress relative to demanding that federal agencies regarding their implementing FCC standards for access to PROW applying to local communities.

Arizona Monitoring, Influencing and Aligning Federal Court Holdings.

History has taught that broadband infrastructure deployment is often accompanied by litigation. Such litigation includes government-on-government, government-on-providers, and providers-on-providers. Often, the litigation is friends-of-the-court briefs, wherein third parties also make their concerns and desired outcomes known. We recommend that Arizona monitor, influence (through amicus briefs), and align to these on-going court actions and holdings.

Arizona Monitoring, Influencing and Aligning Federal Funding.

Because federal funding is critical to substantial portions of rural broadband infrastructure deployment, we recommend that Arizona systematically monitor, influence and align its actions with these funding streams.

C. Recommendations for Arizona Communities

Recommendation for establishing straight-forward PROW/ROW dispute resolution methods.

Arizona communities should recommend to the State of Arizona and the ABDC, specific ROW dispute-resolution processes that can reasonably be binding upon local governments, state agencies, and providers. Arizona communities that adhere to the dispute resolution processes should maintain their respective eligibility for state grant programs.

Recommendation for standardizing processes of obtaining PROW/ROW permits from state entities and local governments associated with constructing broadband infrastructure in Arizona.

Arizona communities should recommend to the State of Arizona and the ABDC, specific legislation that is reasonable for requiring local governments to base ROW applications on a standard format and use standard decision criteria are making decisions for granting ROW. Arizona communities that adhere to the standard format and use standard decision criteria should maintain their respective eligibility standards for state and federal grant programs.

Recommendation for standardizing the time-period for obtaining PROW/ROW permits from state entities and local governments.

Arizona communities should recommend to the State of Arizona and the ABDC, specific legislation that is reasonable for requiring local governments to make decisions regarding ROW applications within a fixed period, based on specific published parameters. Arizona communities that adhere to such fixed period for ROW applications should maintain their respective eligibility standards for state and federal grant programs.

Recommendation for limiting ROW/PROW fees to their cost basis.

Arizona communities should recommend to the State of Arizona and the ABDC, specific legislation they deem to be reasonable for local governments to limit ROW fees to direct costs and administrative costs having a nexus with the ROW application and related zoning application. Arizona communities that adhere to cost-based fees should maintain eligibility standards for state and federal grant programs.

D. Recommendations for the Telecommunications Industry

Recommend straight-forward PROW/ROW dispute resolution methods.

Individual providers and telecommunication industry-based organizations should recommend specific ROW dispute-resolution processes that are binding upon local governments, state agencies, and themselves (as providers).

Recommend standard best practice processes of obtaining PROW/ROW permits from state entities and local governments associated with constructing broadband infrastructure in Arizona.

Individual providers and telecommunication industry-based organizations should recommend specific legislation elements for requiring local governments to base ROW applications on a standard format and use standard decision criteria for making decisions granting ROW. They should tie the lack of state and local adherence to the standard processes/forms with the required time-period to specific dispute resolution methods.

Recommend duration of reasonable time-period for obtaining PROW/ROW permits from state entities and local governments.

Individual providers and telecommunication industry-based organizations should recommend specific fixed time-periods and specific published parameters on which ROW applications should be decided by state and local decision makers. They should tie the lack of state and local adherence with the required time-period to specific dispute resolution methods.

Recommend reasonable cost elements for inclusion in ROW/PROW cost-based fees.

Individual providers and telecommunication industry-based organizations should recommend specific legislation elements for requiring local governments to limit ROW fees assessed by local governments to the direct and administrative costs having a nexus with the ROW application or related zoning application. They should tie the lack of state and local entity adherence with the cost-based fees to specific dispute resolution methods.

IV. Key Organizations and Initiatives

Key Federal Organizations and Initiatives:

Federal Communications Commission:

The FCC regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia and U.S. territories and operates as an independent U.S. government agency overseen by Congress. Following are key FCC initiatives relating to reducing ROW/PROW barriers.

U.S. National Broadband Plan:

The FCC started the process of creating the National Broadband Plan (NBP) should be initiated by the FCC and other executive agencies. According to Broadband.gov, more than 83% of the FCC-related initiatives recommended by the NBP have been undertaken with notable progress in key areas regarding broadband availability, infrastructure, and spectrum reform.

In the area of ROW, broadly defined under "pole attachments," the NBP makes several recommendations. Many of these recommendations were adopted under new rules effective April 7, 2011. They include:

> Recommendation 6.1: Adopt rules establishing lower, more uniform pole attachment rates. New rules provide that wireless providers are subject to the regulated telecommunications rate and will pay per foot of space used for the antenna attachment.
>
> Recommendation 6.2: Adopt rules lowering the cost associated with the pole attachment "make-ready" process. New rules provide that utility pole owners must complete make ready work for wireless attachments in 148 or 178 days, depending on the location on the pole.

Recommendation 6.3: Establish a comprehensive timeline for each step of the Section 224 access process and reform the dispute process. New rules Sets a maximum timeframe of 148 days for utilities to complete make ready work for pole attachments in the communications space and 178 days for pole top attachments, as well as confirming that wireless attachers have the right to non-discriminatory access to pole tops and that utility pole owners must base any denials to attach on statutory grounds of reliability, safety, engineering.

Recommendations 6.9: Congress should consider expressly authorizing federal agencies to set the fees for access to federal rights-of-way on a management and cost recovery basis.

Recommendations 6.10: Develop master contracts to expedite the placement of wireless facilities on federal government property and buildings.

FCC Broadband Acceleration Conference & Notice of Inquiry (NOI):

In February 2011 the FCC held a Broadband Acceleration Conference to explore problems and solutions to network deployment where the FCC's Technical Advisory Committee recommended that the FCC begin looking at ways to quickly reduce barriers to deployment noting, "Improving broadband deployment throughout the nation is one of the great infrastructure challenges of our time." The FCC subsequently issued a Broadband Acceleration NOI officially titled "Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facility Siting" seeks input from broad range of stakeholders on ways to improve overall use of public ROW and reducing barriers to wireless facility siting.

Additional Federal Legislative Initiatives & Opportunities:

We present several additional federal legislative initiatives and related opportunities in the body of this study. In particular, though, H.R.1695, the Broadband Conduit Deployment Act of 2011, was introduced on 5/3/2011 and is currently referred to the House Subcommittee on Highways and Transit. The bill directs the Secretary of Transportation to require states to install broadband conduits (conduits for fiber optic cables or wireless facilities that support broadband service) in certain highway construction projects (construction of a new highway or an additional lane or shoulder for an existing highway) and ensure that any requesting broadband provider has access to such installed broadband conduit on a competitively neutral and nondiscriminatory basis, for a charge not to exceed a cost-based rate.

Key State of Arizona Organizations and Initiatives:

Arizona Strategic Enterprise Technology (ASET) Office

The ASET Office, a division of the Arizona Department of Administration (ADOA. ASET serves as the strategic planning and coordination agency for information technology for the State of Arizona as an office within the ADOA. Its director serves as Deputy Director of DOA and as State Chief Information Officer (CIO).

ASET is the program manager for the State of Arizona for approximately $6.3M in grants awarded by the NTIA through the American Recovery and Reinvestment Act in order to collect broadband access data across the State for analysis and mapping purposes as well as for support of broadband policy planning and community development activities. ASET has launched a new Arizona Broadband Project Portal (http://www.azbroadband.gov/) as a home base for this

project and other broadband initiatives. Additionally, the Arizona State Land Department (ASLD) has publicly launched the related Arizona Broadband Map (http://broadbandmap.az.gov/map/) loaded with the semi-annually updated broadband data sets. Together these sites serve both Arizona's broadband consumer and provider communities, as well as contributing to State policy and strategic planning.

The State of Arizona, supported by ASET, is launching a new broadband policy and planning organization, the Arizona Broadband Development Council (ABDC), to be comprised of government and private sector participants. The ABDC will coordinate broadband policy development and action with groups like the Arizona Telecommunications & Information Council, as well as with community, industry stakeholders, and other state agencies. Portions of the grant are allocated for support of Arizona's rural communities through planning assistance and project seed funding. ASET will select one or more non-profit partners to act as manager and a conduit for providing communities with consultants for strategic planning, technical assistance, and grant writing, e-commerce training and assistance, as well as providing limited seed funding for helping jump start regional infrastructure planning projects.

Arizona Department of Transportation (ADOT)

ADOT is responsible for planning, building and operating a complex highway system in addition to building and maintaining bridges and the Grand Canyon Airport. ADOT also operates the Motor Vehicles Division (MVD) and controls huge swaths of ROW across the State concurrent with highway and facilities placements. Their Utilities Accommodation Policy and Condemnation Authority allows for the creation of ROW utility corridors. Though ADOT has information for each highway project regarding where ROW was purchased and

what rights or limitations may be attached, it is not in any unified dataset and generally must be researched on a case-by-case basis.

Since State highway construction is primarily funded by federal highway programs, any incremental cost such as conduit placement is problematic due to it not being included in the underlying funding model and specifics. There is hope that the federal government may introduce national support and remove this barrier, but also specific grants and programs can be used to cover incremental conduit engineering and placement costs. Road access for maintenance by non-ADOT personnel is always a safety and traffic control issue that can be limited in the case of fiber by placing vaults for service and signal regeneration off the highway at exits, overpasses, and other adjacent ADOT ROW.

ADOT generally acquires ROW for only transportation purposes and often must apply for a change of use for telecom and other utility purposes. However, some federal considerations and initiatives may change this for certain categories of land such as National Parks, Forest Service, Bureau of Land Management, etc. We recommend that Arizona deploy to the fullest extent possible a "two highways for the price of one" strategy to leverage its continuing investments in rural highways by requiring that broadband conduit be installed as part of their rural highway construction projects when practical and costs can be covered. Over time the inventory of in situ conduit would come to solve specific rural connectivity issues and grow to a critical mass of highly useful underlying infrastructure.

ADOT had a Shared ROW project in 2000-2001, approved by the Attorney General's office and resulting in an issued RFP, but unfulfilled due to market conditions at the time. It would have allowed long-haul fiber deployment across major transportation corridors from East to West and North to South across the state by commercial carriers who would provide in kind access to ADOT of empty conduit from the build, anticipating one conduit being reserved for ADOT

Intelligent Transportation System applications and the other supporting regional connectivity and economic development. The thinking behind and underpinnings of this abandoned project might yet prove fruitful in shaping new ADOT ROW broadband use initiatives.

Arizona State Land Department (ASLD)

ASLD's mission is to manage State Trust lands and resources to enhance value and optimize economic return for the Trust beneficiaries, consistent with sound stewardship, conservation, and business management principles supporting socioeconomic goals for citizens. ASLD is mandated to value all State trust land transactions at "highest and best use of land," wherein "fair market value" is a minimum allowable value and their communication lease/ROW fees are based on "value in use" constructs not on the "parcel as a whole."

These fundamentals have substantial impact on ASLD's valuation and leasing processes, for example not allowing them to directly or indirectly reduce fees in recognition of economic development benefits or positive community benefits. Nonetheless, ASLD is an important siting resource for telecom providers offering typical longitudinal communication lease processing of 12-14 months, though circumstances can drive toward a minimum 9-10 months, and typically 6-9 months generally in approving communication tower siting and site leasing. Some lease offerings go to public auction, while others may be processed through other ASLD instruments. Pole attachment by telecom providers requires a separate ROW application for use and appraisal/leasing beyond that for electrical distribution by the utility companies.

ASLD is working collaboratively with the ASET Office in support of the NTIA grants to collect broadband access data across the State for analysis and mapping purposes as well as support broadband policy planning and community

development activities. ASLD regularly shares the biannual broadband data with the NTIA and FCC and has publicly launched the related Arizona Broadband Map (http://broadbandmap.az.gov/map/) loaded with the last broadband data set and additional resources and capabilities.

Arizona Corporation Commission (ACC)

The ACC is an independent regulatory body created by the Arizona Constitution, and thus acts as a fourth branch of State government. The ACC provides traditional public utilities regulation of electric, gas, telecommunications, and water, as well as facilitating the incorporation of businesses and organizations, performing securities regulation, and insuring the safe operations of railroads and gas pipelines in Arizona.

Though the ACC has broad authority in telecom regulation and rate cases, it has no such authority over wireless rates or cable services other than their telephone service offerings. However, as federal Universal Service programs evolve to be applicable to broadband deployment in the future, the ACC can and should duly reconsider the state Universal Service program and develop complementary broadband support capabilities.

Arizona has not to-date petitioned the FCC for preemption of federal pole attachment authority pursuant to Section 1.1414(b) of the FCC's rules so as to take responsibility for administering pole attachments that are currently under the jurisdiction of the FCC. We strongly urge that Arizona do so and duly certify to the FCC that it will regulate rates, terms, and conditions for pole attachments, and, in so regulating, considers the interests of subscribers of cable television services and of telecommunications services, as well as the interests of the consumers of the utility services. Arizona can then issue and make effective rules and regulations implementing their regulatory authority over pole attachments, including a specific

methodology for such regulation and make the rules and regulations publically available in the state.

Arizona Commerce Authority (ACA)

The ACA is a recently formed public-private partnership supplanting the Arizona Department of Commerce and operating as Arizona's lead economic development organization, seeking to attract and retain a diversity of business and to create quality jobs for Arizona and its citizens. Through ACA's rural engagement and support, they often assist in community economic development as well as business siting and other areas where broadband is required and often lacking. They have been a champion of grants and opportunities to expand broadband in Arizona in the past and will remain so going forward.

V. Barriers Based in Constitutional Constraints, Law, Policy, and Rules Hindering Establishing Public Rights-of-Way as Essential Infrastructure for Information Delivery

A. Introductory Observations

A current goal of the United States and the individual states is the rapid expansion of broadband availability-and its associated benefits-to citizens.[6] Public rights of way (PROW), both vertical and horizontal,[7] are often the essential and fundamental infrastructure required for bringing broadband services to unserved and underserved citizens of Arizona. Use of PROW involves an interwoven tapestry of constraints based in federal and state constitutions, laws, and rules-as well as policies that have evolved over years and that generally form basis for interpreting the constraints. Legally, at the core of this tapestry are our federal and state constitutions. All other constraints flow from these constitutions.

At the heart of United States Constitutional powers and constraints is the concept that the federal government has enumerated powers, particularly under the Commerce Clause-but that power is balanced with the Police Powers reserved for the states (and their subdivisions-counties, cities, and towns) under the Tenth Amendment. The federal Congress-by enacting/interpreting laws-can change this balance overnight. However, in all cases, both sides of the balancing equation must be constitutionally preserved.

Coexisting with the US Constitutional powers and constraints are Arizona State Constitutional powers and constraints. Most particular among them is the Gift Clause and that potion which delineates the Arizona Corporation Commission

[6] See report: "Connecting America: The National Broadband Plan" Issued March 16, 2010, http://download.broadband.gov/plan/national-broadband-plan.Pdf

[7] Public rights of way, as used herein, is a broad concept including poles, ducts, conduits, as well as related land easements for deploying fiber and towers.

as the entity primarily responsible for telecommunications oversight; while allowing local entities (political subdivisions) a primary say over concerns that are primarily local.

The Gift Clause strictly limits Arizona public entities from granting gifts to private entities-including those entities that might construct broadband infrastructure. Conversely, the Arizona Constitution appears to allow substantial latitude regarding State government-in general and the ACC in particular-in providing substantial deference to the decisions of political subdivisions that affect both public and private rights of way.

Such State deference to local decision makers is increasingly seen as an impediment to quick effective deployment of broadband infrastructure-both from time-to-market and cost perspectives. Certainly, recent federal initiatives-calculated to speed broadband implementations-often also reduce or restructure local control of their PROW. Thoughtful interactions among federal, state and local governing entities are required to nurture deployment of broadband infrastructure at a quickened pace.

Because the FCC has recently-and aggressively-launched a series of initiatives that tend to usurp local decision making as regards use of public rights of way for telecommunications, state and local entities likely are now posed to be in a reactive mode. The FCC initiatives are largely based on its interpretation/re-interpretation of existing federal law-as being a basis for centralizing heretofore local decision making. Thus, because the FCC initiatives tend to most conflict with manner in which cities and towns make available public and private rights-of-way, including related zoning and permitting, decisions--these local entities not the state governments-are experiencing the brunt of the FCC actions.

Because state governments have traditionally delegated public and private right of way decisions to their respective local entities, the states now have flexibility to act as a catalyst both in terms of lessening the federal demands on the local entities and by imposing state-level solutions (not federal one-size-fits-all solutions) on the local entities. The primary degree of freedom that each state has in this matter is its ability to limit or expand the level of delegation of its Police Powers to the local entities.

A state can re-assert its Police Powers by issuing executive orders and passing legislation that shapes opportunities available to broadband providers when those providers come calling on both state and local officials-asking for timely rights-of-way, zoning and uniform permitting that is necessary for expanding broadband infrastructure. Such is the central means by which states play a substantial part in quickening the pace of broadband infrastructure build-out. However, as states undertake these efforts, each state must be cognizant of the political realities--both as it faces into the federal demands and with regard to local decision makers' cherished home-rule prerogatives.

Politically, likely, it is important that each state act in a fashion to buffer the federal demands, while finding those specific issues and situations under which it should appropriately usurp local control for the betterment of citizens by enabling a more rapid expansion of broadband services to its citizens.

B. Framework for Accessing ROW and PROW

Here we summarize the current framework, under which broadband providers may access existing ROW/PROW, including poles, ducts, conduits, and related land easements for fiber deployments and wireless towers. We start with a perspective of local governments, which control access to their respective ROW/PROW largely by issuing licenses/franchises. The power of local

government (cities and towns) is sourced from Tenth Amendment Police Powers, as delegated by a state to sub-divisions of the state. The power of local government is limited by 1) extent of state delegation of its Police Powers to the local entity; and 2) federal preemption.

Federal preemption-limits local government control through Congress' power under the Preemption and Commerce Clauses-by enacting laws having broader reach. As part of the Telecommunications Act of 1996 (the "1996 Act" or "Act"), Congress intended removal of barriers to entry for telecommunications-by making available more freely the existing ROW and PROW to providers. Foremost among the Federal Regulation resulting from the Act are 47 U.S.C. § 224 (pole attachments), 47 U.S.C. § 253 (removal of barriers to entry), 47 U.S.C. § 332(c)(7)(B) (wireless use of PROW, and 47 U.S.C. § 541 (1984)(cable franchises).

C. Barriers - Current Situation

The following paragraphs walk the reader through most prominent barriers to the speedy availability of public and private rights of way, as pertains to expansion of broadband infrastructure-particularly in rural Arizona.

1. Federal Restraints

a) Mixed Federal Objectives.

Having discussed the US Constitutional constraints in the introductory section, particularly focusing to the federal enumerated powers and the Commerce Clause-as balanced with the Police Powers reserved for the states under the Tenth Amendment; we now turn to barriers that are associated with federal laws and rules.

(1) Public Law No. 107-217 Sec. 1314 (40 USCS Section 1314)

Section 1314—Easements, of Title 40 - Public Buildings, Property, And Works, Subtitle I - Federal Property and Administrative Services, Chapter 13 - Public Property, (see endnote 1[i]) governs the means by which the federal government grants easements on federal property. It works, but several other federal laws are at cross-purposes with Section 1314.

(2) Federal Laws at Cross-Purposes

Federal laws-that on their face are not intentionally as cross-purposes with efficiently making available federal PROW for broadband development; nonetheless the laws often result in cross-purpose. Such laws include the National Environmental Policy Act (NEPA),[8] the National Historic Preservation Act (NHPA),[9] and the Endangered Species Act (ESA),[10] and the National Marine Sanctuaries Act, affect whether PROW is granted at all-or may require that specific conditions or limitations be included in the grant of a particular PROW. For example, Congress enacted NEPA:

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."[11]

The NEPA requires federal agencies study environmental effects of their actions through an interdisciplinary planning process that integrates environmental

[8] 42 U.S.C. § 4321 *et seq.*
[9] 16 U.S.C. § 470 *et seq.*
[10] 16 U.S.C. § 1531 *et seq.*
[11] 42 U.S.C. § 4321.

and economic issues. Further, if an environmental impact merely may be significant, the NEPA process informs and seeks input from the public, tribes, states, and local agencies, as well as other federal agencies.

Similarly, under NHPA, federal government leads preservation efforts and fosters conditions for facilitating "harmonious existence in modern society of prehistoric and historic resources." NHPA, Section 110, provides a broad range of responsibilities for federal agencies-analysis of which takes substantial calendar time and efforts. Example responsibilities include requiring federal agencies establishing preservation programs commensurate with their mission, and to designating federal preservation officers for coordinating agency historic preservation activities.[12]

Similarly, ESA's primary purpose if conserving ecosystems for sustaining endangered and threatened species. ESA is widely reaching in both the plant and animal worlds-including staking out restrictions on habitat that hopefully does not also coincide with broadband infrastructure deployments. In establishing ESA, Congress inadvertently also established a substantial series of trade-offs between broadband availability and such other factors and sustainability of "fish, wildlife, and plant species to be "of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[13] Further, in so doing, Congress established policy mandates for all federal agencies and departments to seek to conserve these species and to support the Act's purposes. Example subsets of the ESA are Interior Department's Fish and Wildlife Service and Commerce Department's National Marine Fisheries Service administer the law. Section 7 of the ESA links all the related agency actions-requiring they conserve threatened and endangered species-in consultation with the U.S. Fish and Wildlife Service. This may be good for the "fish, wildlife, and plant species" but

[12] 16 U.S.C. § 470h-2(a)(2).
[13] 16 U.S.C. § 1531 (a)(2)-(a)(3).

other objectives of the agencies and citizens attempting to obtain agency services-as well as minimize U.S. Fish and Wildlife Service dictates under ESA-suffer consequences of the decision overhead. However, because Section 7 applies to the management of all federal lands-some of which may be habitat for species in jeopardy of extinction, Section 7 also limits easement issuances and related broadband provider activities on federal lands. NEPA, NHPA, ESA and other laws may impose additional responsibilities on right-of-way grantees that may impact their ability to use public lands for the desired commercial purposes.[14]

b) Federal Highway Administration Rules

(1) Federally funded highways

Providers seek uniform treatment when accessing federal, state and municipal roadway-based rights-of-way (PROW), which often are dictated based on federal funding rules (see endnote 2[ii]). Here we focus to three concerns providers have voiced. First, because-when roadway rights of way are available, availability of these resources is throttled by limiting access based on the form of in-kind bartering and costs that individual providers can pass onto consumers. Second, is collection of fees, rents, or other charges above actual administrative costs associated with managing the roadway rights-of-way. Third, FHWA[15] restrictions as to who may access the roadway rights-of-way and their discriminatory impact under the 1996 Act. Key issues that must be addressed are.

1. Including all rural (limited-access and full access) roadways and interchanges-not just Interstate highways. Historically, the FHWA and

[14] Other examples of such laws include: National Wildlife Refuge System Administration Act of 1966, as amended, (16 U.S.C. §§ 668dd -668ee); the Coastal Zone Management Act of 1972, as amended (16 U.S.C. § 1451 *et seq.*); the Archaeological and Historic Preservation Act of 1974, as amended (16 U.S.C. § 469 *et seq.*); Section 404 of the Federal Water Pollution Control Act (Clean Water Act), as amended (33 U.S.C. § 1344); Section 10 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. § 403); and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9601 *et seq.*).
[15] Federal Highway Administration.

AASHTO[16] policies have focused on the Interstate system. At this time rural Arizona, which is served by-federally funded-but state and locally managed roadways that define the PROW that is most necessary for extending broadband middle-mile infrastructure.

2. Coordination of access to limited access highway rights-of-way be coordinated with policies governing access to other public rights-of-way or land and related set-backs
3. Inconsistencies in the means of obtaining PROW at the state-and among the required state entities (ADOT/ASLD), counties, and municipal levels; which overcome unique state laws and constitutional provisions related to state highway trust funds, restrictions on use, and safety and maintenance requirements.
4. Changing the underlying laws and rules requiring broadening the scope of all underlying easements to include all transport-wired and wireless-of telecommunications services inclusive of broadband services.

2. Arizona Constitutional Restraints

a) Gift Clause[17]

Article IX, Section 7 of the Arizona Constitution, commonly referred to as the Gift Clause, strictly prohibits the State and its subdivisions from ever donating or granting public property to private individuals. This is important because it effectively limits "grand bargains" wherein an Arizona public entity (state or local) might otherwise partner with one or more private entities for the purposes of expanding broadband infrastructure-wherein the bargain requires the public entity to contribute public property-without it receiving fair-market compensation. Because this Clause limits public contributions that are necessary to developing broadband infrastructure, such as rights of way and easements, it has the effect of limiting rate at which the private sector actually builds the needed infrastructure.

[16] American Association of State Highway and Transportation Officials.
[17] Article IX, § 7 (the "Gift Clause") of the Arizona Constitution: "Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever ... make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation . . . ."

b) Federal land-grant Requirements[18]

The courts have interpreted the Arizona federal land-grant requirements strictly, leaving precious little room for the State government to modify its current agency rules and policies for advancing the rate of broadband infrastructure build-out.

The Supreme Court of the United States has interpreted the Arizona-New Mexico Enabling Act of 1910, Section 28, as prohibiting the disposition of any Arizona trust land ("State Trust Land") except to "the highest and best bidder at public auction" and requiring an appraisal of the value of the land before there can be a disposition of the land for its "true value." Currently and by Revised Arizona Statute, State Trust Lands are administered by the ASLD.

The ASLD has promulgated a series of rules and policies that together carry out the dictates of the Arizona Constitution (particularly the Gift Clause) and the Arizona-New Mexico Enabling Act, as interpreted by the U.S. Supreme Court. In each and every case that a broadband infrastructure provider petitions for rights of way, easements, or other use of State Trust Lands, the ASLD applies its rules and policies to ensure that the provider pays at a rate equivalent to "the highest and best bidder at public auction" (sometimes referred to as "higher and best use" pricing).

[18] Arizona-New Mexico Enabling Act, Act of June 20, 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557 ("Enabling Act").

> "§ 28 in the Enabling Act "to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands." *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 464 (1967). Section 28 prohibits the disposition of any trust land except to "the highest and best bidder at public auction" and requires an appraisal of the value of the land before there can be a disposition of the land for its "true value." *Id*. at 462. It also precludes any disposition for consideration less than the value of the property. *Id*. As a consequence for failing to abide by its provisions, the Enabling Act provides that any disposition not made in "substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the . . . State to the contrary notwithstanding." Enabling Act § 28. *Mayer Unified School District v. Winkleman*, 207 P.3d 631, 220 Ariz. 378 (Ariz.App.Div.2 05/19/2008).

(1) Easements and Community Betterments

Broadband providers and other users of rights of way across State Trust Lands have sought to determine whether such rights of use might be available at more favorable terms-or more quickly. They have sought easements (specific use of the land) as opposed to purchase (fee simple, fee simple determinable, or like kind), and they have provided additional benefits to the surrounding communities of the State Trust Land. In return they have asked that the additional community benefits be considered in the pricing of the use of the State Trust Lands. The courts have said no.

The landmark case is *Lassen II*, 385 U.S. at 470, 87 S.Ct. 584. In *Lassen* the Supreme Court of the United States held that the Arizona Highway Department must pay for the use of the trust lands [State Trust Lands], even though it was building and maintaining highways for the public's benefit. *Id*. at 466, 87 S.Ct. 584. After examining the Enabling Act's valuation and fund-usage provisions, as well as its background and legislative history, the Court concluded that Congress intended the school land trust to "derive the full benefit of the [federal land] grant." *Id*. at 466-68, 87 S.Ct. 584. To further this purpose, the Court held that the Highway Department must "compensate the trust ... for the full appraised value of any material sites or rights of way which it obtains on or over trust lands." *Id*. at 469, 87 S.Ct. 584. See endnote 3.[iii]

Arizona's current status regarding State Trust Lands is that after substantial litigation, the use and fee structures for use of the Lands is highly monitored and regulated by the ASLD. This fact is not a matter of discretion on ASLD's part, but rather is dictated by largely settled law. Thus, when the desire is to make substantial and quick impact on the rate at which broadband infrastructure can be built-out in Arizona, we should look elsewhere than at State Land.

c) Related Court Decisions-impacting PROW

Following are short summaries of court decisions that relate to, and provide insight as to limitations that the ASLD is under as it administers the Arizona Trust Lands-for PROW purposes.

1. The state land department must receive the true value for any right-of-way across trust lands, and the actual monetary compensation for the right-of-way cannot be diminished by the amount of any enhancement in value that the right-of-way may bring to the remaining State Trust Lands.[19]
2. Lease provisions allowing for future decreases in rental rates if real estate conditions rendered the lease "uneconomic" violated requirements that the state land department must sell or lease state trust land to "highest" bidder.[20]
3. The state is under no obligation to renew any existing lease of State Trust Lands, as the state is required to grant leases in accordance with the best interest of the trust.[21]
4. Exchanges of trust lands, although permitted in Arizona's Enabling Act and Arizona statutes, constituted "sales" without public auction for purposes of Arizona's Constitution and were therefore unconstitutional.[22]

3. State Statutes and Rules

Here we note that Revised Arizona Statues (A.R.S.'s) affect both local and state level entities as they attempt to hasten broadband infrastructure deployment. Also, we provide an in-depth of analysis of these issues in Appendix E - Arizona Limiting Statutes and Rules.

[19] Lassen v. Arizona ex rel. Arizona Highway Dept., 385 U.S. 458 (1967).
[20] Campana v. Arizona State Land Dept., 860 P.2d 1341 (Ariz. 1993).
[21] Havasu Heights Ranch and Development Corp. v. Desert Valley Wood, 807 P.2d 1119 (Ariz. 1990).
[22] Fain Land & Cattle Co. v. Hassell, 790 P.2d 242 (Ariz. 1990).

a) Revised Arizona Statutes

In our analysis of the A.R.S's impacting local and state level entities, starts with a review of A.R.S.'s that govern local entity activities relating to broadband services enablement and barriers. These A.R.S.'s delegate to local entities (political subdivisions) authority for managing their public highways, exercising their police powers, compensation for permitting fees (including transfer of ownership of in-kind facilities), non-discrimination requirements, and mediation requirements.

Additionally, A.R.S's that currently enable and limit the ACC's telecommunications activities—are not interpreted as including broadband services. Under Article 5, the ACC takes a very narrow interpretation of what constitutes a "telecommunications company," framing it as being a "Utility"- the company providing telephone service to the public in compliance with state law. This narrow interpretation of Title 14, Article 5, Telephone Utilities[23] definition contrasts with the ACC's broader Article 11 interpretation of a "telecommunications company," wherein it defines a "public service corporation," as per the Arizona Constitution, Article 15, § 2, which provides telecommunications services[24] within Arizona and over which the ACC has jurisdiction.

b) Arizona State Land Department Rules

The ASLD is the trustee of the Arizona State Trust Lands. As such, the ASLD takes applications. Once the PROW application is submitted and filed with the ASLD, The Right of Way process is initiated by filing pre-defined forms with

[23] Title 14, Article 5, Telephone Utilities, Of The Arizona Administrative Code.
[24] R14-2-1102, part 16 defines "**Telecommunications Service**." [as] Any transmission of interactive switched and non-switched signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwave, or any other electromagnetic means (including access services), which originate and terminate in this state and are offered to or for the public, or some portion thereof, for compensation.

the ASLD, it requires 12-16 months to process an application. After the 12-16 months processing period, the broadband provider applicant is informed of the price it will be charged for using the PROW if the PROW is granted at all, and additional requirements for completing the agreement. Such agreements establish broadband providers with necessary rights of usage across State Trust Land for such purposes as access roads, infrastructure, power lines, communication lines, and the actual broadband infrastructure. The ASLD grants these rights of use for terms varying from one year to perpetuity. Whenever the ASLD grants rights of way having greater than 10 years, such grants are preapproved by the ASLD Board of Appeals.[25] The ASLD requires that Rights of way exceeding 50 years be offered at public auction. All advertising and administrative fees of such auctions must be paid for by applicant.

ASLD PROW agreements require clearances based on the following.

1. Archaeological - State Historical Preservation Office.
2. Native plants - Department of Agriculture.
3. Clearance/Permit may be required if there is impact to "Waters of the U.S."
4. Clearance from Department of Environmental Quality
5. Clearance may be required from various other State agencies.

The ASLD, Supplemental Information Request for Communications PROW, first page, is provided in endnote 4[iv].

c) Arizona Department of Transportation Rules[26]

ADOT is governed by the Arizona Revised Statutes in Title 28-Transportation. ADOT is responsible for providing a network of highways throughout Arizona-known by statute as the Highway System. Because ADOT requires rights of way to accomplish this responsibility, it has established an ADOT ROW Group.

[25] ASLD Board of Appeals is an independent body of 5 members, appointed by the Governor of Arizona.
[26] Arizona Department of Transportation Shared Resource Telecommunication Infrastructure Wireline Policy (ADOT).

1) Scope of activities of the ADOT ROW Group
    a) Longitudinal and vertical ROW
        i) Not including ADOT permitting processes
    b) Negotiates with underlying land owners (fee absolute owners) for an interest-in-the-land, which include
        i) Easements
        ii) Licenses
        iii) Full fee absolute ownership
    c) Scope of existing longitudinal ROW-limited to only "roadway purposes"-not including water, power utility, or telecommunications, beyond ADOT Intelligent Transportation Systems (ITS)
        i) Limited by
            (1) federal law and funding
            (2) AZ Revised Statutes and funding
            (3) AZ Proposition 400 based funding
            (4) Local zoning rules
2) ROW process steps
    a) Planning/Engineering > surveying > appraisals > offer to underlying landowner > offer acceptance > if no acceptance, condemnation procedure > order to show cause (court action) > 90 days to vacate the land > ROW interest in the land.
    b) Experience
        i) 70% of the underlying landowners tend to accept the appraisal offer (short cycle)
        ii) 30% of underlying landowners take the process into condemnation (longer ~ 2 years)

iii) Very few underlying landowners pursue a subsequent court action (> 2-years)

3) Underlying landowners include
   a) Federal entities (easements only)
      i) BLM (easy to come to terms with)
      ii) BIA (difficult to come to terms with)
      iii) Forest Service (difficult to come to terms with)
   b) Native American entities
      i) In conjunction with the BIA
   c) State
      i) ASLD, controlling trust land
      ii) ADOT, controlling direct purchase of land
      iii) ADOA representing land interests of land owned by other AZ State agencies
   d) Local governments
   e) Private owners
4) ADOT Permitting process steps
   a) Is an activity separate from establishing ROW
   b) associated with a short-term activity within an ADOT roadway or associated ADOT controlled land.
   c) Permitting process is primarily under the auspices of the ADOT District Offices (District Engineers)
5) Potential changes in federal rules
   a) Modifying FHWA funding limits
   b) FCC Broadband initiatives
6) Potential changes in AZ statutes and rules

a) Modifying ARS
b) Modifying Proposition 400
c) Modifying AZ agency PSPs (policies/standards/procedures)
d) Constitutional constraints
    i) Gift Clause
    ii) Land grant limitations (highest and best use issues)

7) Vertical ROW issues
    a) Pole attachment (controlled by difference group within ADOT)
    b) Cell sites
8) Other ROW opportunities
    a) Rail
    b) Pipelines
    c) Power utilities
9) Highway operational issues-after construction
    a) Service corridors
    b) Relocating existing telecommunications infrastructure-with roadway re-construction

VI. Near-term Strategies For Overcoming Barriers

Here we explore near-term strategies for overcoming barrier to establishing public rights-of-way as an essential infrastructure for delivering information in Arizona.

A. Federal Initiatives

1. Recent Federal Bills-not Enacted

Because they can accelerate broadband development, these bills deserved further time and attention. Sponsors introduced each into one or both Congressional Chambers, where they received at least moderate levels of discussion, but not passing both Chambers. Even though these bills have not become law, they merit additional attention for the positive contributions they make towards quickening the pace and/or reducing costs of broadband infrastructure at little cost to taxpayers.

a) Broadband Conduit

In 2009 the Broadband Conduit Deployment Act of 2009 was introduced in the House as H.R. 2428 and in the Senate as S.1266. Neither bill passed either chamber and have not since been reintroduced. This same bill-language was re-introduced in 2011 as H.R. 1695.[27] We provide insight as to progress that was made once the bills were introduced in endnote 5[v]. The concept of combining deploying of broadband conduits with highway construction has substantial merit.

[27] The 2011 sponsor is Representative Anna Eshoo (D-CA)—with the stated purpose "[t]o amend title 23, United States Code, to direct the Secretary of Transportation to require that broadband conduit be installed as part of certain highway construction projects, and for other purposes. As of this writing, the bill is in the first step in the legislative process.

However, it must be identified and championed as a bipartisan initiative that broadly and cost effectively benefits most Americans.

b) Fees for Broadband ROW

In 2001 the Reasonable Right-of-Way Fees Act of 2001 was introduced in the House as H.R. 3258, to amend the Federal Lands Policy and Management Act of 1976 and to clarify the method by which the Secretary of the Interior and the Secretary of Agriculture determine the fair market value of rights-of-way granted, issued, or renewed under such Act to prevent unreasonable increases in certain costs in connection with the deployment of communications and other critical infrastructure. This bill, and its 2002/2003 progeny, attempt reinforcing the concept of valuing rights-of-way over federal land-based on the land value-not revenue of broadband providers.

The 2001 bill, after not passing in 2001, was again introduced in the House in 2002 as H.R. 3258 and also in 2003 as H.R. 762. We provide insight as to how the bill progressed after their introduction in endnote 6[vi].

The Reasonable Right-of-Way Fees Act of 2003 (Section 2) intended amending the Federal Land Policy and Management Act of 1976 to direct the Secretary of the Interior to amend the Code of Federal Regulations to revise the per acre rental fee zone value schedule by State, county, and type of linear right-of-way use to reflect current land values. Also, it intended directing the Secretary of Agriculture to make such revisions for linear rights-of-way granted, issued, or renewed on National Forest System lands.

Additionally, the Bill intended directing the Secretaries to annually update the schedules of linear rights-of-way under their respective jurisdictions by a specified method using the Gross National Product Implicit Price Deflator Index. And, requiring the Secretaries to review the zones and rental per acre figures

whenever the cumulative change in the index exceeds 30 percent, or whenever the change in the 3-year average of the 1-year Treasury interest rate used to determine per acre rental fee zone values exceeds plus or minus 50 percent. Also, it authorizes the Secretaries to revise the base zones and rental fees if the value of federal land differs sufficiently from the index to warrant such action.

Further, the Bill intended amending the Mineral Leasing Act to direct the Secretary of the Interior or appropriate agency heads to use the same valuation method as in the Federal Land Policy and Management Act of 1976 (as revised by this Act) to calculate the value of rights-of-way for pipeline passage. Because the earlier attempts resulted in passage through the House—but the 2005 launch effectively had no legs—this concept must be critiqued to better understand its political base as well as its detractors.

The three bills, which have as their primary goal the valuing of federal land rights-of-way at the value of the land-not the value of broadband providers' revenue or other basis-represent a substantial means for limiting provider recurring costs. Going forward, likely this valuing construct should be incorporated into the governance fabric associated with lowering the cost of broadband-particularly as it relates to the western states that have a large presence of federal lands.

2. Federal Communications Commission Actions

The FCC has been deemed the lead federal agency associated with quickening implementation of broadband services nationwide. The FCC has taken its mandate seriously, as can be seen by the following summaries of its recent activities and leadership.

a) The National Broadband Plan

The National Broadband Plan[28] (NBP)-as relates to ROW and PROW. Its goal is "To ensure we lead the world, the NBP addresses the troubling gaps and unrealized opportunities in broadband in America by recommending ways federal, state and local governments can unleash private investment, innovation, lower prices and better options for consumers." It establishes the following categories of recommendations.

1. Promoting robust competition to maximize consumer welfare, innovation and investment.
2. Ensuring efficient allocation and management of assets that government controls or influences to encourage network upgrades and competitive entry.
3. Reforming current universal service mechanisms; and support efforts to boost adoption and utilization.
4. Reforms to maximize the benefits of broadband in government sectors such as public education, healthcare and government operations.

The NBP further delineates ten recommendations. We review those recommendations here—particularly as relates to Arizona.

(1) Recommendation One

Recommendation 6.1: The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224, to promote broadband deployment. The FCC took a major step toward fulfilling this recommendation when it issued the Section 224 Order in April 2011. The Order establishes a more uniform and lower utility pole, duct, conduit, and ROW pricing formula for all providers sans the larger ILECs, whom it judged to still have monopolistic pricing powers.

[28] Report: "Connecting America: The National Broadband Plan" Issued March 16, 2010, http://download.broadband.gov/plan/national-broadband-plan.Pdf

(2) Recommendation Two

Recommendation 6.2: The FCC should implement rules that will lower the cost of the pole attachment "make ready" process. Also, the FCC took a major step toward fulfilling this recommendation when it issued the Section 224 Order in April 2011. The Order establishes substantial procedural constraints on Utilities during the make-ready process, wherein the Utility is engineering and physically preparing its poles for telecommunications attachers.

(3) Recommendation Three

Recommendation 6.3: The FCC should establish a comprehensive timeline for each step of the Section 224 access process and reform the process for resolving disputes regarding infrastructure access. Here, also, the FCC Order streamlined the number of steps and limits the calendar time available to Utilities for responding to attachers requests for use of the Utilities vertical ROW.

(4) Recommendation Four

Recommendation 6.4: The FCC should improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.

(5) Recommendation Five

Recommendation 6.5: Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way. Herein is a strong opportunity for the FCC to act preemptively for the purpose of expanding the definition of Utility under Section 224. At present, the definition includes investor-owned utilities and ILECs-but not cooperatively organized utilities or state-owned or local-community owned PROW. To the extent that the FCC perceives it can do so, within its Commerce Clause-based

powers, it may determine that expanding beyond its current definition of Utility is appropriate.

(6) Recommendation Six

Recommendation 6.6: The FCC should establish a joint task force with state, tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way.

(7) Recommendation Seven

Recommendation 6.7: The U.S. Department of Transportation (USDOT) should make federal financing of highway, road and bridge projects contingent on states and localities allowing joint deployment of conduits by qualified parties. As discussed above, a similar bill has been introduced in the Congress. Even though USDOT may not warmly welcome this recommendation, it may find substantial political support at the federal and state/local levels.

(8) Recommendation Eight

Recommendation 6.8: Congress should consider enacting "dig once" legislation applying to all future federally funded projects along rights-of-way (including sewers, power transmission facilities, rail, pipelines, bridges, tunnels and roads). This recommendation also has seen Congressional action, re: Broadband Conduit Deployment Act of 2009 (S. 1266; H.R. 2428),[29] which would also require all new federal road projects to include contemporaneous placement of conduits to accommodate multiple broadband providers.

[29] And, reintroduced in 2011 Session as H.B. H.R. 1695.

(9) Recommendation Nine

Recommendation 6.9: Congress should consider expressly authorizing federal agencies to set the fees for access to federal rights-of-way on a management and cost recovery basis.

(10) Recommendation Ten

Recommendation 6.10: The Executive Branch should develop one or more master contracts to expedite the placement of wireless towers on federal government property and buildings.

b) Other FCC Actions

(1) Section 224 of the Telecommunications Act of 1996.[30]

47 U.S.C. § 224 (1978, 1996) provides preemptive[31] federal regulation of non-exempt poles, ducts, conduits and related ROW associated with any "Utility" is defined as "any person who is a local exchange carrier,[32] or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications." This definition does not include any railroad, any person who is cooperatively organized. Or any person owned by the Federal Government or any state.

However, Section 251(b)(4) requires each LEC to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent

[30] Also see: *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (WC Docket No. 07-245; GN Docket No. 09-51), (Released: May 20, 2010).
[31] State preemption limits local government control by adjusting the level-of-delegation of the state's Tenth Amendment Police Powers to cities and towns.
[32] Generally, smaller rural LECs are exempt from § 224.

with Section 224" of the 1996 Act. Thus, also ILECs are required to make their poles available in Section 224-even though they are not eligible under Section 224 to obtain the Section 224 benefits from other Utilities. Initially, § 224 was interpreted as only protecting cable operators and competitive telecom providers; but its scope has more recently been expanded to include wireless providers.

Section 224 is unique in that it provides for states to "Reverse Preemption" by Certifying to the FCC under § 224 that they will undertake similar levels of supervision over local authorities. Arizona has not certified under § 224. However, approximately 21 states[33] and the District of Columbia have so certified.

(a) Order On Reconsideration, dated April 7 2011- In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future.

April 7, 2011 the FCC released its Report and Order[34] on Reconsideration ("Order") regarding investor-owned utility pole attachments. The Order appears to be a keystone in the FCC's efforts for advancing broadband deployment as outlined in the NBP. On its surface, the Order removes substantial barriers to continued expansion of broadband and telecommunications infrastructure. Likely, the Order impacts broadly and positively on broadband build-outs. Providers' benefits likely are measurable in terms of reduced costs of deployment, reduced time-to-market and reduced business risks. Because, likely, cost and business risks

[33] The following states have certified under the FCC under § 224 "Reverse Preemption:" Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington. (http://www.fcc.gov/eb/mdrd/PoleAtt.html)

[34] WC Docket No. 07-245.
See Order at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0407/FCC-11-50A1.pdf

reductions are substantial-its impacts on the broadband market may be observable in the near-term.

(b) Wireless Attachers.

The Order expressly includes wireless providers-likely in recognition of potential benefits wireless solutions provide as well as recent court decisions. The Order defines that wireless providers now have express access rights to attach to the top of utility poles, with the same rates as wire-based attachers. However, because utilities may extend by 30 days the 148-day make-ready period for wired attachers, giving wireless attachers a make-ready period of 178 days (see below).

(c) Wire-based Attachers.

Previously the FCC proposed a five-stage timeline, with the goal of requiring 105 to 148 days from completed application to completed make ready, as follows.

1. Stage 1: Initial survey and engineering assessment-45 days
2. Stage 2: Make ready estimate-14 days
3. Stage 3: Attacher acceptance/payment-14 days (or expires)
4. Stage 4: Performance-45 days
5. Stage 5: Multiparty coordination- 30 days more, if necessary.

The Order collapsed Stages 4 and 5 into a single "make-ready" period of 60 days and additionally allowed for a 15-day grace period. Thus, the total performance period is 148 days-for wire-based attachers. This performance period includes any required moving or removal of third-party pole attachments. The express exceptions to this performance period occurs if the attacher tenders a large number of applications to the utility, wherein the utility may add 60 days; or where the utility for "good and sufficient cause" can "stop the clock." Utilities may find

the period burdensome-while attachers are afforded a more concrete planning horizon.

(d) Costs and Rates-a "New Just and Reasonable Telecom Rate".

Costs in this context go to the attacher's costs of surveying and related make-ready costs for attaching to the poles. The FCC has not attempted to use the Order for shaping or limiting these costs, and utilities are anticipated to inject capital costs, associated with third-party pole attachments, into their total make-ready costs.

Rates that attachers must pay under Section 224 are addressed and a "New Just and Reasonable Telecom Rate" is defined. Previously, the FCC established a "Cable rate" under Section 224(d)-a lower bound; and a "Telecom rate" under Section 224(e)—an upper bound. The Order refers to these bounds as "bounds of reasonableness." Then, the Order, utilizing the pay range, established between the Cable rate and Telecom rate, further codifies attacher types and pay-points within the pay range that each attacher type must pay.

Importantly, the Order notes that the Telecom rate is not substantially aligned with FCC's broadband-expansion and level-playing field policy objectives. Thus, the Order tends to drive all broadband attacher-rates (excepting ILECs) toward the lower bound—the well-known Cable rate. The Cable rate is most distinguished by its lack of inclusion of existing-pole capital costs; but which includes make-ready capital costs that are "caused" by an attacher's attachments.

Given these policy objectives, the Order establishes formulae and presumptions for determining a "New Just and Reasonable Telecom Rate," which is substantially equal to the Cable rate. Based on these formulae and presumptions, it is certainly possible for a utility to interpret the numbers in multiple manners. Thus, likely, the parties may look to third-party adjudication methods for

determining actual pole pay-rates. However, it appears likely that the new FCC pole-pricing regime will result in lower pole attachment costs for qualified attachers-which in essence include all broadband providers excepting Incumbent Local Exchange Carriers (ILECs).

(e) ILECs.

Until issuance of the Order, ILECs where specifically excepted as qualified attachers-as relates to the FCC pole pricing regime. The Order opens the door for ILECs-indicating that they may avail themselves to statutory guarantees of just and reasonable pole attachment rates, terms, and conditions. The Order stops short of expressly including ILECs in the category of pole attachers that can use the Order's rate formulas.

(f) Review/Enforcement.

The Order keeps the "sign-and-sue" rule, but does not provide compensatory damages, Additionally, it requires attachers—having a grievance-tender a certified letter to the utility detailing the nature of the grievance. Also, it provides attachers with methods of redress for excess pole rates charged by utilities.

(g) Unauthorized Use Penalties.

The Order strengthens existing fines for unauthorized attachers-focusing to encouraging both parties to participate in periodic pole audits.

(2) Section 251(b) of the Telecommunications Act of 1996.

Section 251(b)(4) requires each LEC to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224" of the 1996 Act.

(3) Section 253 of the Telecommunications Act of 1996.

Section 253 of the Act, 47 U.S.C. § 253, titled "Removal of Barriers to Entry." Sections 253(a)-(c) are pivotal federal legislation regarding preempting local decision-making. In pertinent part, it provides:

> (a) IN GENERAL. No state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(a) 47 U.S.C. § 152 nt. Section 601.

47 U.S.C. § 152 nt, Section 601 provides in subpart (c) Federal, State And Local Law, can be seen as limiting language on Section 253.

> (1) No Implied Effect. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.
> (2) State Tax Savings Provision. Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as

provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

Based on the combination of Section 253 and Section 601, basic propositions-relating to preemption of local control-emerge. These propositions are not highly tested in the courts, but are useful predicate as we pursue broadband policy:

1. Likely, a local law is only subject to preemption if it actually prohibits or has the effect of prohibiting service.
2. Likely, where a local law prohibits or effectively prohibits a provider from providing service, the local law will be preempted if it falls outside the safe harbors of Section 253(b) or (c).
3. Likely, reasonable compensation to local entities for use of public rights-of-way, consistent with applicable state law, is preserved.
4. Likely, management of local rights of way by local authorities is protected—where consistent with applicable state law-absent federal law that is on-point.
5. Likely, local authorities exercising their local taxing authority is protected—where consistent with applicable state law from preemption under Section 253.[35]

(4) Section 332(c)(7)-of the Telecommunications Act of 1996

Two portions of Section 332 are of note relative to Arizona ROW/PROW issues. They are subsection 332(c)(7), which establishes a "shot clock" for timely siting of wireless broadband infrastructure; and 332(c)(7)(B)(iv), which preempts local decision-making based on environmental effects of radio frequency emission. They are discussed below.

[35] The only case to address the issue so holds. *Qwest Corporation v. City of Globe*, 237 F. Supp. 2d 1115, 1118 (D.Az. 2003), *affirmed by*, 434 F.3d 1176, 1184 (9th Cir. 2006).

(a) Preempting Local Officials from Requiring a Variance for All Wireless Proposals.

Section 47 U.S.C. § 332(c)(7)(B) intends ensuring timely siting review of wireless proposals by local officials, preempting state and local ordinances that classify all wireless siting proposals as requiring a variance.[36]

(b) Preemption of State/local Decisions based on RF Emissions.

Even though the FCC generally shows a reluctance to interfere with local zoning decisions, a clear statutory exception is embedded in Section 332(c)(7)(B)(iv) of the 1996 Act states:

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emission to the extent that such facilities comply with the Commission's (FCC's) regulations concerning such emissions."

Based on Section 337 (in conjunction with Section 207) the FCC issued a prohibition of any state or local regulation, "including zoning," which impaired the use of DBS (Direct Broadcast Satellite) and MDS (Multipoint Distribution Services) on antennas less than one meter or any TV antenna.[37]

(5) Section 541 of the Telecommunications Act of 1996 .

47 U.S.C. § 541 (1984) limiting exclusive cable franchises, which effectively had no substantial impact in Arizona.

[36] See FCC WT Docket No. 08-165 to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance.
[37] FCC, Report and Order. Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, August 5, 1996

3. FCC Technical Advisory Council Policy Recommendations.

The Federal Communications Commission (FCC) established a Technical Advisory Council (TAC) in 2010—charged with "identify[ing] important areas of innovation and develop[ing] informed technology policies supporting America's competitiveness and job creation in the global economy." The TAC issued a Report to the FCC Chairman April 22, 2011. The Report focuses to broadband deployment, and more specifically to federal policies that promote build-out of broadband-and which do not require the FCC work through its traditional regulatory processes. They are.

1. Establish a "Broadband City USA" awards/recognition program that incents municipalities to expedite permitting and approval-wherein the FCC publicizes municipal best practices for broadband infrastructure deployment, including a "race to the top" contest and public rankings of cities with the most broadband-friendly infrastructure approval processes.
2. Issue an Executive order for streamlining broadband deployment on federal property-mandating a streamlined, single-agency, 60-day review and approval process for deployment of broadband infrastructure on federal property, and having specific focus on Federal rights-of-way and antenna siting approvals.
3. Advocate rapid tower siting processes-that result in states and municipalities permitting co-location "by right"[38] and employ a shortened "shot clock" for co-locations on existing structure-or the FCC will do so.
4. Best practices-technology outreach to state and local governments-focusing to new broadband deployment technologies. The FCC should frame best practices with states and municipalities regarding proven new broadband deployment technologies like distributed antenna systems (DAS), micro-trenching, and directional boring. Metric is acceleration of infrastructure development for the new deployment technologies.

[38] The TAC has identified several impediments to tower siting processes which could be overcome through updates to state and local procedures, including:

- Inconsistent and non-concurrent time frames for environmental assessments;
- Redundant requirements for co-location applications; and
- Repetitive rejection of incomplete applications without identification of deficiencies.

5. Model an online deployment coordination system-wherein the FCC promotes timely access to underground facilities that have direct bearing on infrastructure costs and speed of development. And, wherein the FCC develops web-based communications tools for providing advanced notification of planned infrastructure projects-facilitating "dig-once" and like-kind coordination that speed broadband development while reducing costs and civic disruption.
6. Promote new metrics for measuring broadband network quality-wherein the FCC would promulgate "extended" broadband service quality metrics (not just speed) to assist providers, consumers and policymakers evaluations of use and benefits of broadband applications such as healthcare monitoring and emergency services. And, wherein the FCC would distinguish between traditional and IP-based benefits including increased reliability and ease of deployment of multi-modal applications.
7. Highlight stranded PSTN[39] investments-wherein the FCC would encourage and initiate public dialogue about technology and know-how for replacing legacy PSTN equipment, including auto-dialers, alarm systems, ATMs, PoS terminals, etc.
   Promote small cell deployment-wherein the FCC would convene industry-led groups for accelerating deploying small cell wireless devices (e.g., DAS, femtocells, Wi-Fi) in commercial and government buildings and other high teledensity venues. Further, the FCC should explore "(1) development of 'universal architectures' for picocells, femtocells, etc., perhaps leveraging convergence around LTE, so that multiple providers using multiple spectrum bands could be served from a single device; and (2) creation of a new "small cell band" spectrum allocation, conceptually a hybrid between licensed and unlicensed spectrum, in which property owners and/or mobile broadband providers would have the ability to freely deploy networks to offload broadband services from other networks with assurances of interference protection from neighboring users."

4. USDOT Actions

Providing Access to Highway Rights-of-Way

The 1996 Act, and recent changes in FHWA and American Association of State Highway and Transportation Officials (AASHTO) policy now support states

[39] Public Switched Telephone Network, which is the traditional voice network in the US.

having the option to accommodate longitudinal access for the telecommunications industry in limited access highway rights-of-way. While the 1996 Act does not compel a state to provide access to its interstate highway rights-of-way, providing access is consistent with the spirit of the 1996 Act. Providing access supports the development of more telecommunications infrastructure and possibly provides an opportunity to obtain compensation or service considerations in exchange for use of these assets.

B. Potential Legislative Actions

1. Model Broadband ROW Legislation and Ordinances

National organizations such as the PCIA,[40] a wireless infrastructure association, have promulgated model state legislation (see endnote 7[vii]) and local ordinances relating to ROW/PROW issues-wherein broadband deployment is a significant or major objective, but which also balance related concerns. States and municipalities have started embracing these models. We have include here a short discussion of the models and provide example model state legislation and local ordinances in the endnotes.

a) Model State Legislation

(1) State-level Wireless Broadband Availability Legislation.

Multiple states have implemented model wireless broadband availability legislation. North Carolina is an example,[41] and we have included similar PCIA State Model Siting Legislation as Appendix F. Its intent is ensuring (1) the safe and efficient integration of facilities necessary for the provision of advanced wireless communications services throughout the community and (2) the ready

[40] http://www.pcia.com/
[41] Other States that have enacted similar legislation include California, Florida, Hawaii, Nevada, and Tennessee.

availability of reliable wireless service to the public and government agencies and first responders, with the intention of furthering the public safety and general welfare.

(2) Other State-level Broadband Legislation Issues.

b) Model Municipal Ordinances

(1) Scope of Municipal Ordinances

Municipalities must distinguish between providers with facilities in the rights-of-way and those simply leasing space on another provider's lines. Section 253(c) limits the scope of municipal ordinances relative to the "use" of public rights-of-way. The "use" issue occurs when cities attempt to impose restrictions on telecommunications resellers, having no facilities within the city's rights-of-way—opting to utilize facilities of other entities that have infrastructure in the rights-of-way. The U.S. District Court held that that "the city's interest in regulating local telephone service providers is limited by federal and state law to managing and demanding compensation for the use of the city's public rights-of-way. The city's unsupported assertion that a non-facilities-based provider is 'using' the city's public rights-of-way is wholly unpersuasive. In fact, it is a metaphysical interpretation of the term 'use' that defies logic and common sense."[42] Thus, municipal rights-of-way ordinances should govern use of city property—not regulate telecommunications resellers.

(2) Timeliness of Permitting Ordinance

Model telecommunications ordinances governing either wireline or wireless infrastructure should provide the a fixed, limited permitting period unless extended

[42] See *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997).

by the permitee—modeled on the FCC five-stage timeline, with the goal of requiring 105 to 148 days, depending primarily on whether multiparty coordination is required.

(3) Adjudication Means

Model telecommunications ordinances should adopt the FCC Section 224 processes as a neutral adjudication means.

(4) Example Model Wireless Telecommunications Ordinance

An example model ordinance is provided in endnote 8.[viii] A model wireless telecommunications ordinance should provide the municipality with necessary governance of the processes of placing and overseeing wireless telecommunications facilities. Pertinent aspects comprise the following.

1. Ensuring compliance with related federal and state laws, rules and policies;
2. Ensuring proper payments;
3. Minimizing potential adverse effects associated with the construction of monopoles and towers through the implementation of reasonable design, landscaping and construction practices;
4. Assuring public health, safety, welfare, and convenience during the operational lifetime of associated structures;
5. Ensuring access to reliable wireless communications services throughout all areas of the municipality;
6. Encouraging use of existing vertical rights of way structures including monopoles, towers, utility poles and other structures for the collocation of telecommunications facilities;
7. Minimizing number of new monopoles and towers required by providing incentives for the use of existing structures;
8. Encouraging location of monopoles and towers, to the extent possible, in areas where the adverse impact on the community will be minimal; and
9. Encouraging location of new monopoles and towers in non-residential areas.

c) State Legislation Limiting Municipal Ordinance

Nevada has enacted a series of bills which together provide a tapestry of statutes establishing its framework for wireless communications facilities. We highlight the Nevada statutes here because they offer a concise perspective of the elements that Arizona may consider as it evaluates best practices associated with streamlining and minimizing costs of wireless infrastructure pre-construction requirements. The Nevada statute changes are itemized in endnote 9.[ix] They offer a balance with regard to affording local decision makers the ability of deciding local issues, while also providing a more defined statewide environment with limited costs.

(a) Centralized authority at State level.

California Senate Bill No. 1627,[43] enacted in 2006 and approved by the Governor in September of 2006 was a substantial step by that state in its efforts to bring about uniformity and speeding the pre-construction timeframes for essential broadband infrastructure. Specifically, it prohibits cities and counties from making wireless telecommunications facilities subject to a permit to operate.

The statue is a *planning and zoning law* authorizing the legislative body of any county or city to adopt ordinances that, among other things, regulate the use of buildings, structures, and land as between industry, business, residences, and open space. It requires California cities, including charter cities, and counties to administratively approve an application for a collocation facility on or immediately adjacent to a wireless telecommunications collocation facility, as defined, through the issuance of a building permit or a nondiscretionary permit, as specified.

[43] An act to add Sections 65850.6 and 65964 to the Government Code, relating to telecommunications.

It also acts as a *permit streamlining act*, defining the term "development project" to include projects involving the issuance of a permit for construction or reconstruction but not a permit to operate.

Further, the statute prohibits a city or county from taking certain actions as a condition of approval of an application for a permit for construction or reconstruction for a development project for a wireless telecommunications facility, and specifies that a development project for a wireless telecommunications facility is not subject to a permit to operate. By imposing new duties on local agencies, this bill imposes a state-mandated local program. We have included the final language of the bill in endnote 10.[x]

C. Potential Policy Actions

1. Executive orders

a) State executive agencies and boards

Many states have recognized the importance of Broadband Infrastructure Coordination Office Legislation. West Virginia is an example.[44] Our discussion here is based on draft legislation provided in Appendix D—Arizona Broadband Infrastructure Coordination Office Draft. Its purpose is creating and setting procedures, responsibilities, and rules for a new state entity: the Arizona Broadband Infrastructure Coordination Office (Office).

Broadband infrastructure, as defined in the legislation, are the facilities and equipment, including cable, fiber, conduit, ducts, poles, cabinets, vaults, manholes, handholes and other associated equipment and appurtenances that are used directly or indirectly in providing broadband services, telecommunications, telecommunications services or other wire and wireless communications.

[44] See http://www.legis.state.wv.us/WVCODE/code.cfm?chap=31&art=15C

Summary of Provisions

A. The ABICO should:

1. Petition the Federal Corporation Commission pursuant to section 1.1414(b) of the commission's rules on pole attachments, certifying to the commission that Arizona preempts the Commission from accepting pole attachment complaints under subpart j of part 1 of the rules; transferring related rule making and adjudication roles on behalf of Arizona, to itself.
2. Provide technical staff and other professional assistance and adjudication as necessary for implementing transferring Section 1.1414(b) of the Federal Communication Commission's rules on pole attachments to the State Of Arizona.
3. Apply for, accept, and administer grants and other financial assistance from the United States government and from other public and private sources to carry out its responsibilities under this chapter.
4. Provide and enforce guidelines and best practices for broadband infrastructure permits and easements with local governments and public and private rights-of-way providers.
5. Adjudicate disputes between providers and local governments and public and private rights-of-way providers with designated powers of arbitration and mediation.
6. Establish and enforce rules and policies for fairly sharing broadband infrastructure enabled by the use of public rights-of-way.

B. The ABICO should also:

1. Develop and adopt funding criteria and prioritization schedules for broadband infrastructure with consideration for recommendations submitted by governmental and educational entities, telecommunications businesses, information services, medical services and statewide trade and business organizations.
2. Evaluate and select projects for technical and financial assistance under this chapter.
3. Impose administrative fees and penalties that are necessary to recover the costs incurred in connection with providing technical assistance.

4. Adopt administrative rules pursuant to Title 41, Chapter 6 to carry out the requirements of this chapter.
5. Consider developments and best practices in other states where broadband services are being deployed for underserved areas, the broadband infrastructure in those areas and the direct and indirect costs and benefits associated with the broadband infrastructure.

b) Fees to State and Local Entities

(1) Fees - reasonableness standard(s)

Rhetoric of all parties is that they desire to be "fair and reasonable." Congress, in Section 253(c) of the 1996 Act, specifically allows for "fair and reasonable" compensation for access to rights-of-way-but does not define "fair and reasonable."

As a result, entities like the FCC-wanting to quickly expand broadband availability-define "fair and reasonable" as being the marginal cost of provisioning a portion of a pole, duct, conduit or related real property rights of way. Such definitions can result in order-of-magnitude reductions in cost to the providers-as compared to market-based judgments of what-constitutes "fair and reasonable."

Conversely, entities having monopolistic pricing-power over singular ROW and PROW sources, such as electrical utilities, LECs, municipalities, and the Arizona State Department Land (trustee of State Trust Lands), tend to carry generalizations like "best and highest" use pricing as well as "fair and reasonable" pricing. Their prognostications of ROW and PROW value set the higher limits of prices actually paid by the providers. Arguably, they also chill incremental decisions for expanding broadband infrastructure requiring associated ROW and PROW. It is the chilling of the incremental broadband build-out decisions that most concerns proponents of rapidly making available broadband services to most citizens of Arizona.

The pragmatic answer to the ROW/PROW value question is that they are worth whatever their owners or trustees can convince someone to pay. Historically, their owners and trustees have also been able to dictate related process and fees. With the exception of the FCC's initiatives in its recent Section 224 Order,[45] likely this status quo will prevail.

There are several options for establishing PROW value including the following, which may be implemented by State Executive Order or Legislation.

1. FCC Section 224 processes and formulae-and their equivalents-with "sign-and-sue" Rule and FCC provided adjudication means.
2. Competitive bidding, wherein value of PROW is determined by bids received in a competitive process.
3. Cost of "next best" alternative ROW/PROW-wherein such alternative ROW/PROW exists-which might include railroad ROW, pipeline ROW, etc.
4. Arms-length negotiations based on value of "next best" use of the PROW
5. Analysis of the market value of the PROW established through negotiations or an appraisal process applied to prior FCC Section 224 processes and formulae.

(2) Method of Payment of Fees.

Traditionally, Arizona State and local officials and trustees of PROW generally charge PROW fees-as cash or barter or a combination of cash and barter. In some cases, lease-like payments can be negotiated.

Bartering, wherein providers leverage their marginal costs of deployment of broadband infrastructure for supplying telecommunications capacity to the public sector entity, is favored by the provider community. This approach is particularly prevalent if the provider is a cable operator; and is also popular where point-to-point wireless or multiple-conduit fiber-optic cabling is deployed. However, such bartering must adhere to the competitively neutral requirements in the 1996 Act.

[45] http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0712/DA-11-1187A1.pdf

(3) Cost Recovery - for government actions - Uniformity of Fees.

Arizona State and local officials and trustees of PROW generally charge fees for administering PROW related issues and permitting. Some of the officials for the trustees offer their PROW related services at fixed rates. Based on informal conversations with providers, the fixed rate menu of services is substantially more preferred than-as compared to metered rates without capping.

VII. Requirements for creating a Broadband Universal Service Fund for Arizona

As of this writing the FCC is in the process of converting the national universal services fund from its traditional focus on switched-voice services to a more expansive scope encompassing broadband delivery of voice and data services. Several states' public utility commissions are is similar discussions—largely following the FCC's lead as they also modernize their traditional definitions of their respective state-level universal services funds (21 states have state universal funds). A common attribute of many of these efforts is including voice over Internet Protocol (VoIP) services in the rate-base for the universal services fund. Because VoIP—based on broadband infrastructure—has become a prominent portion of the revenues coming into the universal services fund, stakeholders have begun arguing that broadband infrastructure providers should be a recipient of disbursements from the fund. Critical to this transition is the FCC's defining VoIP as either a "telecommunications service" or an "information service."

A. Current Arizona Situation

1. Title 14, Article 11, Competitive Telecommunications Services, Of The Arizona Administrative Code.

Arizona established an Arizona Universal Service Fund under A.R.S Title 14, Article 11. Subsequently in 1995 the ACC adopted Rule 14-2-113, which requires: "The [Arizona Corporation] Commission … establish an intrastate universal service fund which shall assure the continued availability of basic telephone service at reasonable rates. The [Arizona] universal service fund shall be structured and administered as required by the Commission [ACC]."

2. Following the FCC's Lead.

In its Reply Comments,[46] dated May 23, 2011, to an FCC proposals for comprehensive reform [of the universal services fund], the ACC stated "At present, the Arizona Universal Service Fund is aimed at providing ongoing support to ensure affordable voice services in Arizona. The Arizona Commission is considering revisions to its state universal service fund now to allow providers to receive support when necessary in conjunction with switched access charge reductions."

In its response the ACC further states it: "agrees with other commenters … that the base if [SIC] contributors should … also include DSL, cable modem and wireless broadband providers … supports the FCC's objectives with respect to broadband … supports the widespread and ubiquitous deployment of broadband and favors its inclusion as a supported service under the CAF … urge the FCC to classify VoIP … as either a "telecommunications service" or an "information service."

[46] https://prodnet.www.neca.org/publicationsdocs/wwpdf/52311azcc.pdf

The U.S. Supreme Court holding in *National Cable & Telecommunications Association v. Brand X Internet Services*[47] provides a basis for the FCC—as well as the 21 states' public utility commissions—classifying VoIP is a telecommunications service. Thus, likely, many of the states will follow the FCC in similarly reclassifying VoIP as either a "telecommunications service" or an "information service."

In Arizona, this likely could have the effect of expanding the Arizona Universal Service Fund. However, heretofore the ACC has not embraced broadband as being within its scope. Thus, the ACC will likely have a new impetus for reconsidering its scope. Some observers believe that the FCC's reclassifying VoIP would prompt the ACC to seek state legislation clarifying its scope in this regard.

[47] National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005).

ENDNOTES

[i] ENDNOTE 1

U.S.C. TITLE 40, SEC. 1314. EASEMENTS
-STATUTE-
(a) Definitions. - In this section -
(1) Executive agency. - The term “executive agency” means an executive department or independent establishment in the executive branch of the Federal Government, including a wholly owned Government corporation.
(2) Real property of the government. - The term “real property of the Government” excludes -
(A) public land (including minerals, vegetative, and other resources) in the United States, including -
(i) land reserved or dedicated for national forest purposes;
(ii) land the Secretary of the Interior administers or supervises in accordance with the Act of August 25, 1916 (16 U.S.C. 1, 2, 3, 4) (known as the National Park Service Organic Act);
(iii) Indian-owned trust and restricted land; and
(iv) land the Government acquires primarily for fish and wildlife conservation purposes and the Secretary administers;
(B) land withdrawn from the public domain primarily under the jurisdiction of the Secretary; and
(C) land acquired for national forest purposes.
(3) State. - The term “State” means a State of the United States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.
(b) Grant of Easement. - When a State, a political subdivision or agency of a State, or a person applies for the grant of an easement in, over, or on real property of the Government, the executive agency having control of the real property may grant to the
applicant, on behalf of the Government, an easement that the head of the agency decides will not be adverse to the interests of the Government, subject to reservations, exceptions, limitations, benefits, burdens, terms, or conditions that the head of the agency
considers necessary to protect the interests of the Government. The grant may be made without consideration, or with monetary or other consideration, including an interest in real property.
(c) Relinquishment of Legislative Jurisdiction. - In connection with the grant of an easement, the executive agency concerned may relinquish to the State in which the real property is located legislative jurisdiction that the executive agency considers necessary or desirable. Relinquishment of legislative jurisdiction may be accomplished by filing with the chief executive officer of the State a notice of relinquishment to take effect upon acceptance or by proceeding in the manner that the laws applicable to the State may provide.
(d) Termination of Easement. -
(1) When termination occurs. - The instrument granting the easement may provide for termination of any part of the easement if there has been -
(A) a failure to comply with a term or condition of the grant;
(B) a nonuse of the easement for a consecutive 2-year period for the purpose for which granted; or
(C) an abandonment of the easement.
(2) Notice required. - If a termination provision is included, it shall require that written notice of the termination be given to the grantee, or its successors or assigns.
(3) Effective date. - The termination is effective as of the date of the notice.
(e) Additional Easement Authority. - The authority conferred by this section is in addition to, and shall not affect or be subject to, any other law under which an executive agency may grant easements.
(f) Limitation on Issuance of Rights of Way. - Rights of way over, under, and through public lands and lands in the National Forest System may not be granted under this section.

-SOURCE-
(Pub. L. 107-217, Aug. 21, 2002, 116 Stat. 1139.)

[ii] ENDNOTE 2

The United State Department of Transportation (U.S. DOT) Federal Highway Administration (FHWA) is responsible for highway safety (23 U.S.C. § 401), the management of right-of-way on the interstate system (23 U.S.C. 109(1) and 111(a)), and implementation of the national ITS program. The FHWA's implementing regulations for utility accommodation are applicable to shared resource agreements and other telecommunications installations. 23 C.F.R. Part 645, Subpart B. The regulations, in part, require that state accommodate utilities in a manner which does not impair the highway or adversely affect highway traffic safety. 23 C.F.R. § 645.211 (a) They explicitly require that states examine the effect of utility installation on "safety, aesthetic quality, and the cost or difficulty of highway and utility construction and maintenance." 23 C.F.R. § 645.211 (b). Right-of-way management responsibilities have largely been devolved to the states, but must remain consistent with FHWA regulations, not only those at 23 C.F.R. Part 645, but also those at 23 C.F.R. Part 710 governing the interstate right-of-way.

[iii] ENDNOTE 3

Specifically on the question: whether Arizona easement holders must compensate the Arizona school land trust for the easements:

The Arizona Supreme Court (AzSC) first answered the question in *State ex rel. Conway v. State Land Department*, 62 Ariz. 248, 156 P.2d 901 (1945). *Conway* involved an order by the Commissioner requiring the State Highway Department to surrender all easements it held over trust lands. *Id.*at 249-50, 156 P.2d at 902. These easements would be reissued, at the Commissioner's option, as leases. *Id.* The Highway Department sought a declaratory judgment that the Commissioner lacked the authority to issue the order. *Id.* at 249, 156 P.2d at 901. The AzSC held that the Highway Department was "not required to pay ... for the taking or use" of trust lands for building and maintaining state highways. *Id.* at 255-56, 156 P.2d at 904.

Again in 1965 the AzSC in *State ex rel. Arizona Highway Department v. Lassen (Lassen I*), addressed whether the Commissioner could adopt a rule requiring compensation for public highway rights of way and material sites on trust lands. 99 Ariz. 161, 162, 407 P.2d 747, 747-48 (1965). The AzSC prohibited adoption of the rule and held that the Commissioner must grant material sites and easements to the Highway Department without requiring compensation for the public use of the trust lands. *Id.* at 168, 407 P.2d at 752.

However, the United States Supreme Court (USSC) granted certiorari and reversed. *Lassen II*, 385 U.S. at 470, 87 S.Ct. 584. The USSC held that the Highway Department must pay for the use of the trust lands, even though it was building and maintaining highways for the public's benefit. *Id.* at 466, 87 S.Ct. 584. After examining the Enabling Act's valuation and fund-usage provisions, as well as its background and legislative history, the Court concluded that Congress intended the **school** land trust to "derive the full benefit of the [federal land] grant." *Id.* at 466-68, 87 S.Ct. 584 (citation omitted). To further this purpose, it held that the Highway Department must "compensate the trust ... for the full appraised value of any material sites or rights of way which it obtains on or over trust lands." *Id.* at 469, 87 S.Ct. 584.

[iv] ENDNOTE 4

FORM (RW-C) COMMUNICATIONS – PAGE 1 OF 2 SUPPLEMENTAL INFORMATION REQUEST			
APPLICANT NAME:		APPLICATION NUMBER:	
PERMANENT RIGHT OF WAY WIDTH (10' IS NORM):		Feet	
ERMANENT RIGHT OF WAY LENGTH:		Feet	
3. WITHIN EXISTING RIGHT OF WAY CORRIDOR? NO YES TYPE:			
Stand Alone		Co-Located with: (mark all that apply) other communication line on pipeline in pipeline within static line underhung other	
Kind of utility, name and right of way number. _____			
4. ADDITIONAL TEMPORARY RIGHT OF WAY WIDTH NEEDED FOR CONSTRUCTION:		Feet	
5. SIZES AND LOCATON OF STAGING AREAS ON STATE LAND: (Attach additional sheet if necessary.)			
6. TYPE OF CABLE:		___ Fiber Optic ___ Copper ___ Other_____	
7. NUMBER OF CONDUITS TO BE INSTALLED:	_____Conduits	8. INSIDE DIAMETER OF EACH CONDUIT TO BE INSTALLED:	Inches

[v] ENDNOTE 5

H.B. 2428: Broadband Conduit Deployment Act of 2009
On May 14, 2009 Representative Ms. Anna G. Eshoo (D, CA) introduced HB 2428 on behalf of herself, Representative Waxman, Doucher, and Markey. Text of the bill, as introduced, is provided in endnote one .
Co-Sponsors.
1. Rep Boucher, Rick [VA-9] - 5/14/2009
2. Rep Filner, Bob [CA-51] - 7/27/2010
3. Rep Frank, Barney [MA-4] - 9/14/2010
4. Rep Markey, Edward J. [MA-7] - 5/14/2009
5. Rep Stark, Fortney Pete [CA-13] - 9/14/2010
6. Rep Waxman, Henry A. [CA-30] - 5/14/2009
7. Rep Woolsey, Lynn C. [CA-6] - 8/9/2010

Actions taken regarding the Bill.
The bill was referred to the following Committees:
1. 5/14/2009, Referred to the House Committee on Transportation and Infrastructure; and
2. 5/15/2009, Referred to the Subcommittee on Highways and Transit. No action was taken by the Highways and Transit Subcommittee.

Related Bills.
The related bill to HB 2428 is S. 1266.

S. 1266: Broadband Conduit Deployment Act of 2009
On June 15, 2009 Senator Amy Kolbuchar (D, MN) introduced S. 1266 on behalf of herself and Senators Warner and Lincoln to amend title 23, United States Code, to direct the Secretary of Transportation to require that broadband conduit be installed as part of certain highway construction projects, and for other purposes. Text of the bill, as introduced, is provided in endnote 2 .
Co-Sponsors.
1. Sen Lincoln, Blanche L. [AR] - 6/15/2009
2. Sen Warner, Mark R. [VA] - 6/15/2009

Actions taken regarding the Bill.
The bill was referred to the following Committees:
1. 6/15/2009 Referred to Senate committee, where it was read twice; and
2. Referred to Committee on Environment and Public Works, where no action was taken.

HR 2428 IH 'Broadband Conduit Deployment Act of 2009'.
(S1266 has similar language)
111th CONGRESS, 1st Session
To amend title 23, United States Code, to direct the Secretary of Transportation to require that broadband conduit be installed as part of certain highway construction projects, and for other purposes.
IN THE HOUSE OF REPRESENTATIVES
May 14, 2009
Ms. ESHOO (for herself, Mr. WAXMAN, Mr. BOUCHER, and Mr. MARKEY of Massachusetts) introduced the following bill; which was referred to the Committee on Transportation and Infrastructure

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A BILL
To amend title 23, United States Code, to direct the Secretary of Transportation to require that broadband conduit be installed as part of certain highway construction projects, and for other purposes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.
This Act may be cited as the 'Broadband Conduit Deployment Act of 2009'.
SEC. 2. INCLUSION OF BROADBAND CONDUIT INSTALLATION IN CERTAIN HIGHWAY CONSTRUCTION PROJECTS.
Chapter 3 of title 23, United States Code, is amended by adding at the end the following:
'Sec. 330. Inclusion of broadband conduit installation in certain highway construction projects

‘(a) In General- The Secretary shall require States to install broadband conduit in accordance with this section as part of any covered highway construction project.
‘(b) Installation Requirements- In carrying out subsection (a), the Secretary shall ensure with respect to a covered highway construction project that--
‘(1) an appropriate number of broadband conduits, as determined by the Secretary, are installed along such highway to accommodate multiple broadband providers, with consideration given to the availability of existing conduits;
‘(2) the size of each such conduit is consistent with industry best practices and is sufficient to accommodate potential demand, as determined by the Secretary; and
‘(3) hand holes and manholes for fiber access and pulling with respect to each such conduit are placed at intervals consistent with industry best practices, as determined by the Secretary.
‘(c) Standards- The Secretary shall establish standards to carry out subsection (b) that consider population density in the area of a covered highway construction project, the type of highway involved in such project, and existing broadband access in the area of such project.
‘(d) Pull Tape- The Secretary shall ensure that each broadband conduit installed pursuant to this section includes a pull tape and is capable of supporting fiber optic cable placement techniques consistent with industry best practices, as determined by the Secretary.
‘(e) Depth of Installation- The Secretary shall ensure that each broadband conduit installed pursuant to this section is placed at a depth consistent with industry best practices, as determined by the Secretary, and that, in determining the depth of placement, consideration is given to the location of existing utilities and the cable separation requirements of State and local electrical codes.
‘(f) Definitions- In this section, the following definitions apply:
‘(1) BROADBAND- The term ‘broadband’ means an Internet Protocol-based transmission service that enables users to send and receive voice, video, data, graphics, or a combination thereof.
‘(2) BROADBAND CONDUIT- The term ‘broadband conduit’ means a conduit for fiber optic cables that support broadband or, where appropriate, wireless facilities for broadband service.
‘(3) COVERED HIGHWAY CONSTRUCTION PROJECT- The term ‘covered highway construction project’ means a project to construct a new highway or to construct an additional lane or shoulder for an existing highway that is commenced after the date of enactment of this section and that receives funding under this title.
‘(g) Waiver Authority- The Secretary may waive the application of this section or any provision therein if the Secretary determines such waiver appropriate with respect to a covered highway construction project.
‘(h) Coordination With FCC- In carrying out this section, the Secretary shall coordinate with the Federal Communications Commission as the Secretary determines appropriate, including in making determinations with respect to potential demand under subsection (b)(2) and existing broadband access under subsection (c).’.
SEC. 3. CLERICAL AMENDMENT.
The analysis for chapter 3 of title 23, United States Code, is amended by adding at the end the following:
‘330. Inclusion of broadband conduit installation in certain highway construction projects.’.

[vi] ENDNOTE 6

H.R. 3258: Reasonable Right-of-Way Fees Act of 2002
On November 8, 2001 Representative Ms. Barbara Cubin (R, WY) introduced HR 3258 on behalf of herself and five co-sponsors. Text of the bill, as introduced, is provided in end note one .
Co-Sponsors.
1. Rep Calvert, Ken [CA-43] - 4/17/2002;
2. Rep Radanovich, George [CA-19] - 12/18/2001;
3. Rep Tauzin, W. J. (Billy) [LA-3] - 4/11/2002;
4. Rep Wilson, Heather [NM-1] - 12/18/2001; and
5. Rep Young, Don [AK] - 4/10/200.

Actions taken regarding the Bill.
The bill saw the following actions:
1. 11/8/2001: Referred to the House Committee on Resources.
2. 11/13/2001: Referred to the Subcommittee on Forests and Forest Health.
3. 11/13/2001: Referred to the Subcommittee on National Parks, Recreation and Public Lands.
4. 4/11/2002: Subcommittee Hearings Held.
5. 11/13/2001: Executive Comment Requested from USDA, Interior.
6. 4/16/2002: Executive Comment Received from Interior.
7. 6/26/2002: Committee Consideration and Mark-up Session Held.
8. 6/26/2002: Ordered to be Reported (Amended) by Unanimous Consent.
9. 6/26/2002: Subcommittee on National Parks, Recreation and Public Lands Discharged.
10. 6/26/2002: Subcommittee on Forests and Forest Health Discharged.
11. 7/11/2002 1:57pm: Reported (Amended) by the Committee on Resources. H. Rept. 107-563.
12. 7/11/2002 1:58pm: Placed on the Union Calendar, Calendar No. 337.
13. 7/22/2002 3:11pm: Mrs. Cubin moved to suspend the rules and pass the bill, as amended.
14. 7/22/2002 3:11pm: Considered under suspension of the rules. (consideration: CR H5001-5002)
15. 7/22/2002 3:11pm: DEBATE - The House proceeded with forty minutes of debate on H.R. 3258.
16. 7/22/2002 3:19pm: On motion to suspend the rules and pass the bill, as amended Agreed to by voice vote. (text: CR H5001)
17. 7/22/2002 3:19pm: Motion to reconsider laid on the table Agreed to without objection.
18. 7/22/2002 3:19pm: The title of the measure was amended. Agreed to without objection.
19. 7/23/2002: Received in the Senate and Read twice and referred to the Committee on Energy and Natural Resources.

Cost Impact.

The Congressional Budget Office studied and reported a cost estimate for the Bill would reduce direct spending by $14 million in 2005. See foot note 2 .

Related Bills.
The related bill to H.R. 2428 is H.R. 762, introduced in 2003.

H.R. 762, Reasonable Right-of-Way Fees Act of 2003
On February 13, 2003, Representative Ms. Barbara Cubin (R, WY) introduced H.R. 762 to amend the Federal Land Policy and Management Act of 1976 and the Mineral Leasing Act to clarify the method by which the Secretary of the Interior and the Secretary of Agriculture determine the fair market value of certain rights-of-way granted, issued, or renewed under these Acts. Text of the bill, as introduced, is provided in endnote 3 . It passed the House of Representatives April 1, 2003.
Co-Sponsors.
1. Rep Gibbons, Jim [NV-2] - 2/27/2003;
2. Rep McInnis, Scott [CO-3] - 2/13/2003;
3. Rep Radanovich, George [CA-19] - 2/13/2003;
4. Rep Tauzin, W. J. (Billy) [LA-3] - 2/13/2003;
5. Rep Wilson, Heather [NM-1] - 2/13/2003; and

6. Rep Young, Don [AK] - 2/13/2003.

Actions taken regarding the Bill.
Summary of actions of the Bill:
1. 2/13/2003: Introduced in House.
2. 4/1/2003: Passed/agreed to in House: On motion to suspend the rules and pass the bill Agreed to by voice vote.
3. 6/12/2003: Senate committee/subcommittee actions: Committee on Energy and Natural Resources Subcommittee on Public Lands and Forests. Hearings held.

The bill saw the following specific actions:
1. 2/13/2003: Referred to the House Committee on Resources.
2. 2/25/2003: Referred to the Subcommittee on National Parks, Recreation and Public Lands.
3. 2/25/2003: Referred to the Subcommittee on Forests and Forest Health.
4. 2/25/2003: Referred to the Subcommittee on Energy and Mineral Resources.
5. 2/25/2003: Executive Comment Requested from Interior.
6. 4/1/2003 1:25pm: Mr. Renzi moved to suspend the rules and pass the bill.
7. 4/1/2003 1:26pm: Considered under suspension of the rules. (consideration: CR H2534-2535).
8. 4/1/2003 1:26pm: DEBATE - The House proceeded with forty minutes of debate on H.R. 762.
9. 4/1/2003 1:31pm: On motion to suspend the rules and pass the bill Agreed to by voice vote. (text: CR H2534-2535).
10. 4/1/2003 1:31pm: Motion to reconsider laid on the table Agreed to without objection.
11. 4/2/2003: Received in the Senate and Read twice and referred to the Committee on Energy and Natural Resources.
12. 6/12/2003: Committee on Energy and Natural Resources Subcommittee on Public Lands and Forests. Hearings held.

Cost Impact.

The Congressional Budget Office did not study and report a cost estimate for the Bill.

H.R. 906, Reasonable Right-of-Way Fees Act of 2005

On February 17, 2005, Representative Ms. Barbara Cubin (R, WY) introduced H.R. 906 to amend the Federal Land Policy and Management Act of 1976 and the Mineral Leasing Act to clarify the method by which the Secretary of the Interior and the Secretary of Agriculture determine the fair market value of certain rights-of-way granted, issued, or renewed under these Acts. Text of the bill, as introduced, is provided in end-note 4 .

Co-Sponsor.

1. Rep Inglis, Bob [SC-4] - 7/29/2005.

Actions taken regarding the Bill.

1. 2/17/2005: Referred to the House Committee on Resources.
2. 3/3/2005: Referred to the Subcommittee on Forests and Forest Health.
3. 3/3/2005: Referred to the Subcommittee on Energy and Mineral Resources.

Cost Impact.

The Congressional Budget Office did not study and report a cost estimate for the Bill.

[vii] ENDNOTE 7

MODEL STATE LEGISLATION

http://www.pcia.com/index.php?option=com_content&view=article&id=78&Itemid=159

Model State Legislation as Composed by PCIA, the wireless infrastructure association

Many states have recognized that wireless communications are an essential ingredient in their future, impacting economics, public safety, education and social development. Because wireless infrastructure deployment is such an important part of the state's overall wireless future, state legislatures may consider legislation that provides more certainty of process in siting wireless infrastructure. PCIA has developed model legislation that encourages collocation on existing facilities and provides municipalities guidelines on how to effectively develop their own wireless siting ordinances. The legislation balances municipalities' concerns about the aesthetic and safety impacts of wireless facilities with citizens' demand for ubiquitous wireless communications. This model legislation, provided complimentary, has been endorsed by both the National Conference of State Legislatures (NCSL) and the American Legislative Exchange Council (ALEC).

PCIA's model legislation has been used as a guide in developing wireless facilities legislation in California, Florida, Hawaii, Nevada, North Carolina, and Tennessee.

CALIFORNIA: CA SB1627 (enacted 2005)
California's legislation encourages collocations by eliminating the need for "discretionary permits" when collocating on facilities that already have such a permit. Instead collocations on these facilities are permitted by-right with a building permit. When a new facility is issued a discretionary permit, it is an indication that all federal state and local requirements, including California Environmental Quality Review Act requirements, have been met, and the site conforms to all aesthetic and design requirements contained in the community plans. At least one public hearing is necessary before a discretionary permit is issued for a wireless facility, and all permits issued must be valid for at least 10 years absent a showing that there is a need to do otherwise. The legislation prohibits requiring an escrow deposit for removal but does allow for a performance bond reasonably related to actual removal costs. Finally, the legislation prohibits requirements that wireless facilities are limited to sites owned by particular parties.

FLORIDA: FL CH.2005-171 (enacted 2005)
Florida's wireless facility siting legislation officially encourages collocation and provides for by-right collocation when neither the structure height nor ground space is increased and the collocation complies with other applicable regulations. While a public hearing is permitted for appeals of collocation decisions, there is administrative review only of nonconforming collocations and tower replacements of the same height as the original structure.

When siting new wireless facilities, the Florida legislation prevents jurisdictions from inquiring about business decisions or quality of service considerations for proposed collocations. The law also provides parameters for setback requirements, providing that setbacks cannot exceed minimum necessary distance required for structural and locational safety. For residential siting, the law allows jurisdictions to take actions to minimize facilities in residential areas, so long as the limitations do not actually or effectively prohibit wireless service, which would also violate federal law. The jurisdiction is disallowed from inquiring into the facility's compliance with federal law except for certification of compliance with FAA regulations from 14 CFR 77 and FCC authorized spectrum use.

The law provides guidelines on timing and fees as well, giving the jurisdiction 20 days to notify the applicant of any application deficiencies and requiring a decision on a completed application within 45 days. Any fees assessed by the jurisdiction must be reasonably related to actual review expenses.

HAWAII: HI Act 171 (enacted 2007)
Hawaii siting legislation states that collocations on existing structures are a permitted use on Class A or B Agricultural parcels.

NEVADA: 2003, ch. 329, § 8, p. 1860 (enacted 2003)
Nevada law instructs jurisdictions to provide for administrative-level review of wireless facility applications if they meet certain criteria. Jurisdictions are to review wireless facilities applications according to administrative review

standards (i.e., avoiding public hearings) if the applications comply with the jurisdiction's land use standards and procedures, and if the applicant itself is an FCC-licensed provider of wireless telecommunications with a Nevada business license. The proposed facility must also be architecturally integrated so that its function as a wireless facility is not "readily apparent." Collocations on existing wireless facilities that are architecturally integrated are also included in this review category, as are collocations on government-owned land that are architecturally integrated (though collocations on public utility property need not be). Any administrative-level denials must be in writing and indicate the element that the application failed to meet.

In all cases, the jurisdiction is prohibited from considering RF emissions as a factor in its review so long as the site is compliant with FCC standards. Requests for sites in the public right of way cannot be denied if the applicant meets all generally applicable right of way standards and does not endanger the public health or safety. Fees for applications for new facilities are assessed based on "actual costs incurred" by the jurisdiction. In the even the jurisdiction denies the application, it shall set forth in writing specifically why it was denied and describe the documents it used to make that decision.

NORTH CAROLINA: NC SB 831 (enacted 2007)
North Carolina wireless facility legislation encourages collocations and streamlines their approval process. When certain collocation criteria are met, collocations are not subject to additional zoning requirements or public hearings. Criteria for this streamlined process include not changing the dimensions of the tower or ground space, ensuring that the tower is in compliance with all original siting requirements, and that the collocation does not create safety issues or exceed the facility's load capacity. In turn for the streamlined process, jurisdictions are able to evaluate the feasibility of collocation as an alternative to building a new facility within the applicant's search ring.

The law also instructs jurisdictions on processing specific elements of new wireless facility siting applications. Applicants for new facilities must be notified within 45 days of any deficiencies in their application, which is also true for collocations. Also, the application review process must be focused on public safety, land development and zoning issues, instead of on the applicant's business judgment to build the facility or perceived customer demand for a facility. If a jurisdiction elects to use a consultant's service in the application process, such fees are set in advance and must be reasonable and customary for that type of review. While the land use permit cannot be conditioned on the requirement that a service provider document commitment to install equipment at the facility, the building permit review process may factor in this consideration.

TENNESSEE: TN CH. 373 (enacted 2005)
Tennessee siting legislation encourages collocation by holding that a jurisdiction cannot regulate placement of additional antennas on existing wireless transmission facilities. Jurisdictions are permitted to regulate collocations when doing so would increase the height of the facility, require lighting, or exceed the local height limit. Applicants cannot be asked to prove the need for increased RF capacity in the area, and jurisdictions cannot make permit denials that would actually or effectively prohibit the provision of wireless services in the area.

[viii] ENDNOTE 8

NEVADA: FACILITIES FOR PERSONAL WIRELESS SERVICE

NRS 707.550 Definitions. As used in NRS 707.550 to 707.585, inclusive, unless the context otherwise requires, the words and terms defined in NRS 707.555 to 707.570, inclusive, have the meanings ascribed to them in those sections.

(Added to NRS by 2003, 1860)
NRS 707.555 "Facility for personal wireless service" defined. "Facility for personal wireless service" includes any building, structure, antenna and other equipment used to provide personal wireless service. The term includes a telecommunications tower.

(Added to NRS by 2003, 1860)
NRS 707.560 "Land use authority" defined. "Land use authority" means an agency, bureau, board, commission, department, division, officer or employee of the State or of a local government authorized by law to take action on an application to construct a facility for personal wire service.

(Added to NRS by 2003, 1860)
NRS 707.565 "Personal wireless service" defined. "Personal wireless service" has the meaning ascribed to it in 47 U.S.C. § 332(c)(7)(C), as that provision existed on July 1, 2003.

(Added to NRS by 2003, 1860)
NRS 707.570 "Telecommunications tower" defined. "Telecommunications tower" means any freestanding tower, monopole or similar structure used to provide personal wireless services.

(Added to NRS by 2003, 1860)
NRS 707.575 Procedures and standards for review and approval of application to construct facility; requirements following denial of application; limitations on power of land use authority.
1. Notwithstanding any specific statute or ordinance to the contrary, a land use authority with jurisdiction over an application to construct a facility for personal wireless service shall:
(a) Establish procedures and standards for the review and approval of such an application, including, without limitation, procedures for:
(1) Review and approval of such an application by administrative staff pursuant to this section; and
(2) Consideration of such an application by the land use authority if the administrative staff denies the application; and
(b) Authorize administrative staff to review and approve such an application pursuant to this section.
2. The administrative staff authorized to review and approve an application to construct a facility for personal wireless service may approve such an application if:
(a) The applicant complies with the procedures established by the land use authority pursuant to this section;
(b) The facility for personal wireless service meets the standards established by the land use authority pursuant to this section;
(c) The applicant is a provider of wireless telecommunications that is licensed by the Federal Communications Commission to provide wireless telecommunications services over a designated radio frequency and authorized to do business in this state; and
(d) The facility for personal wireless service is to be:
(1) Architecturally integrated with its surroundings so that it appears to be an architectural feature of a building or other structure and its nature as a facility for personal wireless service is not readily apparent;
(2) Collocated with a facility for personal wireless service approved, or capable of being approved, by the land use authority, if the facility for personal wireless service that is the subject of the application is architecturally integrated as described in subparagraph (1) at least to the extent that the facility for personal wireless service with which it is to be collocated is architecturally integrated;

(3) Constructed on an existing building or structure owned by a public utility or on property owned by the State or by a local government; or
(4) If constructed on an existing building or structure not owned by a public utility, architecturally compatible with the building or structure.
3. If the administrative staff authorized pursuant to this section to review and approve an application to construct a facility for personal wireless service denies such an application, the administrative staff shall provide to the applicant and the land use authority a written explanation that identifies each procedure and standard that the applicant, application or facility for personal wireless service failed to meet.
4. The land use authority shall not:
(a) Consider the environmental effects of radio frequency emissions from a facility for personal wireless service if the facility complies with the regulations of the Federal Communications Commission concerning such emissions.
(b) If the application to construct a facility for personal wireless services requests the use of a public right-of-way, deny the application based on the use of the public right-of-way if the proposed use:
(1) Meets all applicable state and local requirements for use of a public right-of-way, including, without limitation, any requirements established by the land use authority; and
(2) Does not endanger the public health or safety.
(Added to NRS by 2003, 1860)

NRS 707.580 Assessment of costs incurred to process application. A land use authority, in connection with an application to construct a facility for personal wireless service, may assess the applicant for the actual costs incurred by the land use authority to process the application.
(Added to NRS by 2003, 1861)

NRS 707.585 Written decision required upon denial of application; contents of decision; filing of decision and record with court upon bringing action against land use authority.
1. A land use authority that denies the approval of an application to construct a facility for personal wireless service shall issue a written decision. The decision must:
(a) Set forth with specificity each ground on which the authority denied the approval of the application; and
(b) Describe the documents relied upon by the land use authority in making its decision.
2. A person who brings an action against a land use authority pursuant to NRS 278.0233 shall file a copy of the decision and record with the court.
(Added to NRS by 2003, 1861)

[ix] Endnote 9

NEVADA: FACILITIES FOR PERSONAL WIRELESS SERVICE

NRS 707.550 Definitions. As used in NRS 707.550 to 707.585, inclusive, unless the context otherwise requires, the words and terms defined in NRS 707.555 to 707.570, inclusive, have the meanings ascribed to them in those sections.

(Added to NRS by 2003, 1860)
NRS 707.555 "Facility for personal wireless service" defined. "Facility for personal wireless service" includes any building, structure, antenna and other equipment used to provide personal wireless service. The term includes a telecommunications tower.

(Added to NRS by 2003, 1860)
NRS 707.560 "Land use authority" defined. "Land use authority" means an agency, bureau, board, commission, department, division, officer or employee of the State or of a local government authorized by law to take action on an application to construct a facility for personal wire service.

(Added to NRS by 2003, 1860)
NRS 707.565 "Personal wireless service" defined. "Personal wireless service" has the meaning ascribed to it in 47 U.S.C. § 332(c)(7)(C), as that provision existed on July 1, 2003.

(Added to NRS by 2003, 1860)
NRS 707.570 "Telecommunications tower" defined. "Telecommunications tower" means any freestanding tower, monopole or similar structure used to provide personal wireless services.

(Added to NRS by 2003, 1860)
NRS 707.575 Procedures and standards for review and approval of application to construct facility; requirements following denial of application; limitations on power of land use authority.
1. Notwithstanding any specific statute or ordinance to the contrary, a land use authority with jurisdiction over an application to construct a facility for personal wireless service shall:
(a) Establish procedures and standards for the review and approval of such an application, including, without limitation, procedures for:
(1) Review and approval of such an application by administrative staff pursuant to this section; and
(2) Consideration of such an application by the land use authority if the administrative staff denies the application; and
(b) Authorize administrative staff to review and approve such an application pursuant to this section.
2. The administrative staff authorized to review and approve an application to construct a facility for personal wireless service may approve such an application if:
(a) The applicant complies with the procedures established by the land use authority pursuant to this section;
(b) The facility for personal wireless service meets the standards established by the land use authority pursuant to this section;
(c) The applicant is a provider of wireless telecommunications that is licensed by the Federal Communications Commission to provide wireless telecommunications services over a designated radio frequency and authorized to do business in this state; and
(d) The facility for personal wireless service is to be:
(1) Architecturally integrated with its surroundings so that it appears to be an architectural feature of a building or other structure and its nature as a facility for personal wireless service is not readily apparent;
(2) Collocated with a facility for personal wireless service approved, or capable of being approved, by the land use authority, if the facility for personal wireless service that is the subject of the application is architecturally integrated as described in subparagraph (1) at least to the extent that the facility for personal wireless service with which it is to be collocated is architecturally integrated;
(3) Constructed on an existing building or structure owned by a public utility or on property owned by the State or by a local government; or

(4) If constructed on an existing building or structure not owned by a public utility, architecturally compatible with the building or structure.
3. If the administrative staff authorized pursuant to this section to review and approve an application to construct a facility for personal wireless service denies such an application, the administrative staff shall provide to the applicant and the land use authority a written explanation that identifies each procedure and standard that the applicant, application or facility for personal wireless service failed to meet.
4. The land use authority shall not:
(a) Consider the environmental effects of radio frequency emissions from a facility for personal wireless service if the facility complies with the regulations of the Federal Communications Commission concerning such emissions.
(b) If the application to construct a facility for personal wireless services requests the use of a public right-of-way, deny the application based on the use of the public right-of-way if the proposed use:
(1) Meets all applicable state and local requirements for use of a public right-of-way, including, without limitation, any requirements established by the land use authority; and
(2) Does not endanger the public health or safety.
(Added to NRS by 2003, 1860)

NRS 707.580 Assessment of costs incurred to process application. A land use authority, in connection with an application to construct a facility for personal wireless service, may assess the applicant for the actual costs incurred by the land use authority to process the application.
(Added to NRS by 2003, 1861)

NRS 707.585 Written decision required upon denial of application; contents of decision; filing of decision and record with court upon bringing action against land use authority.
1. A land use authority that denies the approval of an application to construct a facility for personal wireless service shall issue a written decision. The decision must:
(a) Set forth with specificity each ground on which the authority denied the approval of the application; and
(b) Describe the documents relied upon by the land use authority in making its decision.
2. A person who brings an action against a land use authority pursuant to NRS 278.0233 shall file a copy of the decision and record with the court.
(Added to NRS by 2003, 1861)

[x] ENDNOTE 10

CA Senate Bill No. 1627

CHAPTER 676

An act to add Sections 65850.6 and 65964 to the Government Code, relating to telecommunications.

[Approved by Governor September 29, 2006. Filed with Secretary of State September 29, 2006.]

The people of the State of California do enact as follows:

SECTION 1. Section 65850.6 is added to the Government Code, to read:

65850.6.

(a) A collocation facility shall be a permitted use not subject to a city or county discretionary permit if it satisfies the following requirements:

(1) The collocation facility is consistent with requirements for the wireless telecommunications collocation facility pursuant to subdivision (b) on which the collocation facility is proposed.

(2) The wireless telecommunications collocation facility on which the collocation facility is proposed was subject to a discretionary permit by the city or county and an environmental impact report was certified, or a negative declaration or mitigated negative declaration was adopted for the wireless telecommunications collocation facility in compliance with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), the requirements of Section 21166 do not apply, and the collocation facility incorporates required mitigation measures specified in that environmental impact report, negative declaration, or mitigated negative declaration.

(b) A wireless telecommunications collocation facility, where a subsequent collocation facility is a permitted use not subject to a city or county discretionary permit pursuant to subdivision (a), shall be subject to a city or county discretionary permit issued on or after January 1, 2007, and shall comply with all of the following:

(1) City or county requirements for a wireless telecommunications collocation facility that specifies types of wireless telecommunications facilities that are allowed to include a collocation facility, or types of wireless telecommunications facilities that are allowed to include certain types of collocation facilities; height, location, bulk, and size of the wireless telecommunications collocation facility; percentage of the wireless telecommunications collocation facility that may be occupied by collocation facilities; and aesthetic or design requirements for the wireless telecommunications collocation facility.

(2) City or county requirements for a proposed collocation facility, including any types of collocation facilities that may be allowed on a wireless telecommunications collocation facility; height, location, bulk, and size of allowed collocation facilities; and aesthetic or design requirements for a collocation facility.

(3) State and local requirements, including the general plan, any applicable community plan or specific plan, and zoning ordinance.

(4) The California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) through certification of an environmental impact report, or adoption of a negative declaration or mitigated negative declaration.

(c) The city or county shall hold at least one public hearing on the discretionary permit required pursuant to subdivision (b) and notice shall be given pursuant to Section 65091, unless otherwise required by this division.

(d) For purposes of this section, the following definitions apply:

(1) "Collocation facility" means the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility.

(2) "Wireless telecommunications facility" means equipment and network components such as towers, utility poles, transmitters, base stations, and emergency power systems that are integral to providing wireless telecommunications services.

(3) "Wireless telecommunications collocation facility" means a wireless telecommunications facility that includes collocation facilities.

(e) The Legislature finds and declares that a collocation facility, as defined in this section, has a significant economic impact in California and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution, but is a matter of statewide concern.

(f) With respect to the consideration of the environmental effects of radio frequency emissions, the review by the city or county shall be limited to that authorized by Section 332(c)(7) of Title 47 of the United States Code, or as that section may be hereafter amended.

SEC. 2. Section 65964 is added to the Government Code, to read:
65964. As a condition of approval of an application for a permit for construction or reconstruction for a development project for a wireless telecommunications facility, as defined in Section 65850.6, a city or county shall not do any of the following:
(a) Require an escrow deposit for removal of a wireless telecommunications facility or any component thereof. However, a performance bond or other surety or another form of security may be required, so long as the amount of the bond security is rationally related to the cost of removal. In establishing the amount of the security, the city or county shall take into consideration information provided by the permit applicant regarding the cost of removal.
(b) Unreasonably limit the duration of any permit for a wireless telecommunications facility. Limits of less than 10 years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. However, cities and counties may establish a build-out period for a site.
(c) Require that all wireless telecommunications facilities be limited to sites owned by particular parties within the jurisdiction of the city or county.

SEC. 3. It is the intent of the Legislature that a permit to operate a wireless telecommunications facility is not intended to preclude compliance by an applicant or city or county with the Permit Streamlining Act (Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code) or any other applicable state or federal statutes or regulations.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.